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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1989 by state appellate courts and federal courts are summarized and analyzed in this book. The analyses, each written by one or more experts in education law, are divided into eight topical chapters: (1) employees; (2) bargaining; (3) pupils; (4) handicapped; (5) torts; (6) sports; (7) finance; and (8) higher education. The book includes a 14-page alphabetical index of cases cited in the text as well as a 5-page subject index. (MLF)

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THE YEARBOOK
OF
EDUCATION LAW
1990

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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CONTENTS

1 EMPLOYEES

Ralph D. Mawdsley

Introduction / 2
Discrimination in Employment / 2
    Race / 3
    Religion / 5
    Sex / 5
    National Origin / 6
    Age / 6
    Handicap / 7
Substantive Constitutional Rights / 8
    Speech / 8
    Association / 10
    Privacy / 11
    Substantive Due Process / 11
Procedural Due Process / 12
    Liberty and Property Interests / 13
    Aspects of Notice / 15
    Aspects of Hearing / 15
Dismissal, Nonrenewal, Demotion, and Discipline / 16
    Insubordination / 18
    Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 19
    Immorality / 20
    Incompetence / 21
    Compliance with School Board Policies and State Statutes / 21
Reduction-in-force and Involuntary Leaves of Absence / 24
    Necessity for Reduction-in-force / 25
    Elimination of Position / 25
    Selection of Employees / 26
    Realignment/Reassignment / 27
    Call Back Rights / 28
Contract Disputes / 28
    Board Policies and Contract Stipulations / 28
    Administrative Regulations and Statutory Provisions / 31
Tenure / 33
    Tenure Status / 33
    Tenure by Default to Acquiescence / 35
Certification / 35
    Certification Standards / 35
    Decertification, Revocation, or Suspension / 36

2 BARGAINING

Janet M. White

- Introduction / 39
- Constitutional Issues / 39
- Recognition and Representation Issues / 42
  - Unit Determination / 42
    - Supervisory, Managerial, and Confidential Employees / 42
    - School Status / 43
    - Substitute, Part-time, and Nonprofessional Employees / 43
- Rights and Obligations of Exclusive Bargaining Representatives / 44
  - Union Rights / 44
- Scope of Bargaining / 45
  - Mandatory Topics of Bargaining / 45
  - Prohibited Topics of Bargaining / 47
- Grievability and Arbitrability / 48
  - Presumption and Arbitrability / 48
  - Who Determines / 50
- Judicial Review / 51
  - Propriety of Arbitral Awards and Agency Decisions / 51
    - Salary Issues / 51
    - Supplemental Duties / 51
    - School Calendar / 51
    - Medical Leave / 52
    - Reprimand / 52
    - Dismissal, Nonrenewal, Reduction-in-force, Layoff, and Demotion / 52
    - Agency Review / 56
- Strikes and Sanctions / 57
- Conclusion / 58

3 PUPILS

Henry S. Lufler, Jr.

- Introduction / 59
- Public School Assignment, Tuition, and Transportation / 60
  - Tuition and Assignment / 60
  - Transportation / 62
  - Home Instruction / 63
  - Compulsory Attendance / 66
- Private and Parochial Schools / 67
- Substantive Rights of Students / 69
  - Search and Seizure / 69
  - First Amendment Religious Rights / 73
  - First Amendment Freedom of Expression / 77

Sanctions for Student Misconduct/80
    Suspensions and Expulsions / 82
    Corporal Punishment / 84
Bilingual-Bicultural Programs / 86
Desegregation / 87
    Cross-district Remedies / 87
    Desegregation Plan Oversight / 90
    State Court Cases / 93

4 HANDICAPPED

Allan G. Osborne, Jr.

Introduction / 96
Entitlement to Services / 96
Procedural Safeguards / 98
    Change in Placement / 99
    Administrative Remedies / 100
    Standing to Sue / 102
    Statute of Limitations / 102
    Actions Under Other Statutes / 103
Placement / 103
    Appropriate Educational Program / 104
    Least Restrictive Environment / 104
    Private Facilities / 107
Related Services / 108
Discipline / 109
Remedies / 110
    Damages / 110
    Tuition Reimbursement / 111
    Attorneys Fees / 112
State Immunity / 114
Other EHA Issues / 115
State Laws / 116
Discrimination Under the Rehabilitation Act, Section 504 / 117
    Students / 117
    Employees / 119
        Discrimination Claims / 119
        Handicapped Persons / 120
        Otherwise Qualified Individuals / 120
        Reasonable Accommodation / 121
    Other Section 504 Issues / 122

5 TORTS

William J. Evans, Jr.

Introduction / 123
Negligence / 124
    Injuries / 124
        Off School Property and After School Hours / 124
        School Settings During School Hours / 125
        En route to and from School / 129
        School Buildings and Grounds / 130
        School-related Activities / 132
Negligence Defenses / 132
    Immunity / 132
        Common Law (Governmental Immunity) / 133
        Statutory Immunity / 136
    Other Defenses / 138
        Notice of Claim / 138
        Comparative Negligence / 140
Liability Insurance / 141
Attorney Fees / 143
Employee Injuries/Workers' Compensation / 144
Defamation / 146
Intentional Infliction of Emotional Distress / 147
Tortious Interference with a Contract / 147
Product Liability / 147
Construction Contracts / 149
Constitutional Torts / 152
    Student Initiated Cases / 152
    Employee Initiated Cases / 154

6 SPORTS

Linda A. Sharp

Introduction / 156
Eligibility / 156
    Discipline / 156
    Age / 157
    Limitations on Years of Eligibility / 157
    Transfer / 158
    Outside Participation / 158
    Drug Testing / 159
Equality of Programs / 159
    Handicapped / 159
Enforcement of Rules / 160
Tort / 160
    Intentional / 160
        Reckless Misconduct / 160
        Assault / 161
    Negligence / 161

        Participants / 161
        Spectators / 165
Employment / 166
    Adverse Employment Decisions / 166
        Refusal to Renew Coaching Contract / 166
        Resignation / 166
    Contract Disputes / 167
    Collective Bargaining / 168
    Unemployment Compensation / 169
    Discrimination / 169
        Race / 169
        Sex / 170
Miscellaneous / 170
    Taxation / 170
    Public Records / 171
    Licensing / 171
    First Amendment / 172

7 FINANCE

Patricia G. Anthony and Bettye MacPhail-Wilcox

Introduction / 173
Public Funds for Private Schools / 174
Sources and Allocations of Public School Funds / 175
    State School Finance Programs / 175
    Local Funds for Education / 181
    Federal Funds for Education / 182
    School Fees / 183
School Tax Issues / 184
    Tuition / 184
    Tax Assessment and Collection / 185
    Use of School Tax Base Revenues / 187
    Tax Exemptions / 188
    Tax Deductions / 190
    Tax Revenue Disbursement / 190
    Bond Issuance / 190
    Delinquent School Taxes / 192

8 HIGHER EDUCATION

Robert M. Hendrickson

Introduction / 195
Intergovernmental Relations / 195
Discrimination in Employment / 202
    Title VI / 203
    Title VII / 204

- The Equal Pay Act / 207
- Title IX / 207
- Age Discrimination in Employment / 208
- Rehabilitation Act / 208
- Hiring Discrimination / 209

Faculty Employment / 209
- Nontenured Faculty / 209
  - First Amendment Freedom of Speech / 209
  - Nonrenewal or Denial of Tenure / 210
  - Part-time Faculty / 214
- Tenured Faculty / 214
  - Termination for Cause / 214
  - Termination for Financial Exigency / 215
  - Denial of Faculty Privileges / 216

Administrator and Staff Termination / 216

All Employees / 219
- Sexual Harassment / 219
- Denial of Employee Benefits / 219
- Collective Bargaining / 221

Students / 223
- Admissions / 223
- Nonresident Tuition / 223
- Financial Aid / 224
- First Amendment / 230
  - Freedom of Speech / 230
- Dismissal / 232
  - Disciplinary Dismissal / 232
  - Academic Dismissal / 233
- Other Constitutional Issues / 236

Liability / 237
- Personal Injury / 237
- Workers' Compensation / 239
- Contract / 240
- Deceptive Practices / 242
- Negligence / 243
- Medical Malpractice / 244
- Antitrust / 245
- Patents / 245
- Estates and Wills / 246

1

EMPLOYEES

Ralph D. Mawdsley

Introduction / 2
Discrimination in Employment / 2
    Race / 3
    Religion / 5
    Sex / 5
    National Origin / 6
    Age / 6
    Handicap / 7
Substantive Constitutional Rights / 8
    Speech / 8
    Association / 10
    Privacy / 11
    Substantive Due Process / 11
Procedural Due Process / 12
    Liberty and Property Interests / 13
    Aspects of Notice / 15
    Aspects of Hearing / 15
Dismissal, Nonrenewal, Demotion, and Discipline / 16
    Insubordination / 18
    Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 19
    Immorality / 20
    Incompetence / 21
    Compliance with School Board Policies and State Statutes / 21
Reduction-in-force and Involuntary Leaves of Absence / 24
    Necessity for Reduction-in-force / 25
    Elimination of Position / 25
    Selection of Employees / 26
    Realignment/Reassignment / 27
    Call Back Rights / 28
Contract Disputes / 28
    Board Policies and Contract Stipulations / 28
    Administrative Regulations and Statutory Provisions / 31
Tenure / 33
    Tenure Status / 33
    Tenure by Default to Acquiescence / 35
Certification / 35
    Certification Standards / 35
    Decertification, Revocation, or Suspension / 36

INTRODUCTION

This chapter covers the nearly 220 cases reported in calendar year 1989 involving pre-collegiate, public-sector employees. The review excludes only those cases analyzed in other sections of the *Yearbook* (e.g., higher education, collective bargaining). Those cases where purely procedural issues are involved are omitted and procedural issues in the remaining cases are deemphasized. The year 1989 saw one Supreme Court case related to school employment; in addition Supreme Court cases from prior years will be mentioned when they are necessary for an understanding of current cases. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains the largest concentration of cases, while the section on procedural due process contains the next largest concentration.

DISCRIMINATION IN EMPLOYMENT

Discrimination claims can be based on a number of federal statutes, the most preeminent of which is title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private institutions from discriminating based on race, color, religion, sex, and national origin. Gender-based employment discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination on the basis of age for persons forty and over is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1964.[6] Complaints may also be pursued under section 1983 of the Civil Rights Act of 1964 which protects constitutional and statutory rights.[7] However, section 1983 creates no substantive rights but merely provides a remedy for violation of other federally protected rights. Thus alleged title VII violations cannot be asserted under section 1983, but alleged race discrimination under section 1981 and equal protection can be prosecuted under section 1983.[8] Finally, employment discrimination based on suspect classifications such as race, gender, and national origin can be pursued under the equal protection clause of the fourteenth amendment.

---

[1] 42 U.S.C. § 2000 *et seq.*

[2] 20 U.S.C. § 1681 *et seq.*

[3] 29 U.S.C. § 206 (d) (1).

[4] 42 U.S.C. § 1601 *et seq.*

[5] 20 U.S.C. § 794 *et seq.*

[6] 42 U.S.C. § 1981.

[7] 42 U.S.C. § 1983.

Successful prosecution of an employment discrimination case involves navigating through some potentially difficult statutory and judicial waters. Although normally a discrimination charge must be filed with the appropriate state or local agency within 240 days to ensure that the charge may be filed with the Equal Employment Opportunity Commission (EEOC) within the 300-day limit, claims filed within the 241-300-day time period are considered filed with EEOC where the state and local agency has a work sharing agreement with EEOC.[9] A black teacher and administrator who was able to prove disparate treatment in salary, job classification, promotional consideration, and job duties, as compared to white males similarly situated, was entitled to back pay even though the state Human Rights Commission did not hear his case until thirteen years after it was filed. The court concluded that when a complainant has acted with all diligence in filing a complaint, laches will not bar relief or lessen the amount of the back pay awarded.[10]

Parties in an employment discrimination case must meet judicially-established burden of proof requirements: plaintiff must present evidence she was burdened by an employer policy or practice affecting a category protected by one or more of the antidiscrimination statutes, at which time the burden of producing evidence shifts to the employer to articulate by a preponderance of the evidence a nondiscriminatory reason for the treatment. However, once the employer has articulated a nondiscriminatory reason for the action, the employer is not required to prove that a discriminatory reason played no part in the employment decision concerning plaintiff.[11]

Race

This section saw one Supreme Court decision. In *Jett v. Dallas Independent School District,*[12] sections 1981 and 1983 actions were brought by a former white football coach and athletic director reassigned to another school with noncoaching responsibilities by the school superintendent at the recommendation of plaintiff's black high school principal. The Supreme Court determined that the school district could be liable under section 1983 only if the superintendent "possessed final policy making authority in the area of employee transfers," while the school district could not be liable "for its employees' violation of the rights enumerated in section 1981 under a theory of *respondeat superior*."[13]

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[8] McCauley v. Greensboro City Bd. of Educ., 714 F. Supp. 146 (M.D.N.C. 1987).

[9] Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989).

[10] Pittsburgh Bd. of Pub. Educ. v. Human Relations Comm'n, 563 A.2d 581, 582 (Pa. Commw. Ct. 1989).

[11] Indiana Civil Rights Comm'n v. Culver Educ. Found., 535 N.E.2d 112 (Ind. 1989).

[12] 109 S. Ct. 2702 (1989).

In four other cases in this section, plaintiffs experienced a measure of victory in two of them. A teacher from 1978-80 who had been a party to a lawsuit in 1985 contending the policies and practices of the school district were racially discriminatory stated a cause of action for retaliation when she applied for a vacant position in April 1985 and was not hired.[14] In another case, a reassignment of white and Hispanic football coaches to the sophomore staff in order to make room for two black coaches was a violation of equal protection and the school district's justification that 80% of the team was black was insufficient. Replacing coaches on the basis of race denied the replaced coaches "their meaningful constitutional right to be free from subjection to suspect racial classifications absent a demonstrable justification compelling enough to survive strict scrutiny."[15]

Complaints based on race were unsuccessful in two other cases. A black nontenured principal who was not awarded tenure after a three year probationary period, and who was succeeded by a white male principal, failed to state a *prima facie* case permitting an inference of discrimination, because the white principal also had to serve a three year probationary period.[16] In the second case, elimination of two positions, one of which was occupied by plaintiff (a black female noncertified vocational assistant), in a funded program in order to save money, and hiring of a white female certified teacher's aide in a completely separate employment category, constituted a nondiscriminatory reason sufficient to rebut plaintiff's race discrimination claim. Plaintiff's claim of her offer to accept less money to keep her job failed to demonstrate that defendant's reason was pretextual because the decision to eliminate the two positions occurred prior to the offer. In addition, the new position had teaching duties which plaintiff's vocational assistance position lacked.[17]

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[13] *Id.* at 2724.

[14] Sherpell v. Humnoke School Dist. No. 5 of Lonoke County, Ark., 874 F.2d 536 (8th Cir. 1989).

[15] Covington v. Beaumont Indep. School Dist., 714 F. Supp. 1402, 1407 (E.D. Tex. 1989).

[16] Louis v. Board of Educ. of City of N.Y., 705 F. Supp. 751 (E.D.N.Y. 1989).

[17] Smith v. Chicago Bd. of Educ., 530 N.E.2d 1089 (Ill. App. Ct. 1988).

Religion

No cases were reported in this area.

Sex

In all but one case in this section, school districts were successful. In an imaginative claim of gender discrimination a federal district court found no *prima facie* case in a class action lawsuit by elementary principals, most of whom were male, who alleged that their lower pay, when compared to high school principals, occurred because they supervised predominantly female teachers or because there was an historical perspective that elementary schools were traditionally female and their principalships were traditionally female jobs.[18] In another case, a female employee whose position was terminated by the school board at a point in time after she had ceased a consensual sexual relationship with her principal failed to prove sexual discrimination under title VII and section 1983. To prove sexual discrimination, the plaintiff had to produce evidence that employment termination resulted from a failure to provide sexual favors, not merely that the defendant-principal bore a personal grudge and reacted harshly to the failed relationship.[19] In a case involving the potential extent of liability, sexual and/or racial harassment by a superior cannot be imputed to an employer where the employer had addressed earlier complaints and remediated them and had no knowledge of a later anonymous note which evidenced discriminatory intent by the supervisor.[20] In a close case, a school district proffered a nondiscriminatory reason for terminating plaintiff (school superintendent's secretary) where she had prepared and delivered to the school board a salary study on secretary salaries but had not delivered a copy of the study to the superintendent prior to the school board meeting (at which the superintendent was asked to respond), because plaintiff told the superintendent she had not trusted him to deliver a copy of the study to the board. While "disloyalty" by itself cannot be "the sole legitimate nondiscriminatory reason for discharging an employee," unreasonable conduct which results in loss of mutual trust and confidence in the work place will be sufficient.[21]

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[18] Siegel v. Board of Educ. of City School Dist. of City of N.Y., 713 F. Supp. 54 (E.D.N.Y. 1989).

[19] Keppler v. Hinsdale Township High School Dist., 715 F. Supp. 862 (N.D. Ill. 1989).

[20] Fisher v. Tacoma School Dist. No. 10, 769 P.2d 318 (Wash. Ct. App. 1989).

[21] Jennings v. Tinley Park Community Consol. School Dist. No. 146, 864 F.2d 1368, 1373 (7th Cir. 1988).

The only successful claimant under this section experienced a less than total victory. A black female teacher with twenty-five years teaching experience and holder of both a master's degree and a secondary principal's certificate was not hired for six or eight administrative positions she had applied for over a five year period. In each case she was the only female applicant and in each case a male applicant was recommended by the male superintendent to an all-male school board. Because of plaintiff's obvious objective qualifications, the court found suspect the superintendent's subjective selection criteria of "leadership," "ability," and "stability." However, no compensatory damages were awarded, but plaintiff was to be granted the next administrative position that became vacant.[22]

National Origin

Only one case was reported in this area. A Mexican-American who filed a title VII and section 1983 national origin discrimination charge when defendant failed to hire her for the 1984-85 school year did not have to file a separate EEOC complaint when she was not hired for the 1985-86 school year since she alleged the 1985-86 decision not to hire her was "in retaliation for her EEOC filing and part of an ongoing pattern of discrimination."[23]

Age

The cases in this section reflect the difficulty in winning under ADEA. In a new hire situation, a federal court of appeals refused to accept the EEOC position that hiring a teacher under age forty, instead of a forty year old plaintiff, as a result of utilizing a salary scale paying a lower salary for lesser years of experience, constituted discrimination under ADEA. The court noted that to accept EEOC's position "would, contrary to the ADEA, effectively require a preference in hiring to those forty and over."[24] A school board did not violate ADEA in hiring a forty-one year old person as Coordinator of Transportation instead of a sixty-one year old plaintiff where state statute required that hiring and promotion be based on seniority, qualifications, and evaluation of past service with the board; in this case, the successful applicant had seventeen years seniority with the board while plaintiff had none.[25] A sixty-two year old Headstart worker who had been suspended as a result of her alleged spanking of a child contrary to school rules established a *prima facie* case of age discrimination but was not successful in demonstrating as pretextual the school's nondiscriminatory defense that three other teachers had previously been suspended for spanking children in support of a policy to protect the safety and welfare of students.[26] Two previously furloughed teachers were unable to establish a *prima facie* case under either a disparate treatment or disparate impact theory where a majority of 700 applicants for thirteen teaching positions were under age forty but a majority of those actually hired were over forty. Finally, a plaintiff who had been reassigned from principal of an elementary school to a dual principalship over two elementary schools farther from her home at a time when she was over sixty-five failed to prove "that she suffered a *materially adverse* change in the terms or conditions of employment because of her employer's discriminatory conduct."[28]

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[22] Willis v. Watson Chapel School Dist., 703 F. Supp. 1381 (E.D. Ark. 1988).

[23] Brown v. Hartshorne Pub. School Dist. No. 1, 864 F.2d 680, 682 (10th Cir. 1988).

[24] EEOC v. Atlantic Community School Dist., 879 F.2d 434, 437 (8th Cir. 1989).

[25] Dalton v. Mercer County Bd. of Educ., 887 F.2d 490 (4th Cir. 1989).

Handicap

Cases under this section represented successes for both plaintiffs and defendants. An employee who had retired due to psychiatric disability and was later denied reinstatement eight years later for the same disability was able to present evidence he was physically fit for duty, but he failed to controvert evidence that his continuing psychiatric disability prevented him from performing his activities in a reasonable manner.[29] However, in a state handicap act case, refusal of a school board to hire plaintiff as a school bus driver because the state would not grant a license after the school district's physician found a spinal problem did not immunize the school district from liability under the state act. A triable issue was presented because plaintiff's physician said plaintiff was able to drive a bus and summary judgment was denied the school district because of possible risk of collusion between the school district and its physicians regarding employment decisions.[30]

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26. Mingo County Equal Opportunity Council v. State Human Rights Comm'n, 376 S.E.2d 134 (W. Va. 1988).

27. Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989).

28. Spring v. Sheboygan Area School Dist., 865 F.2d 883, 885 (7th Cir. 1989) (emphasis in original).

29. Bolecek v. State, 542 N.Y.S.2d 268 (App. Div. 1989).

30. Wilks v. Taylor School Dist., 435 N.W.2d 436 (Mich. Ct. App. 1988).

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion (i.e., the right to substantive due process under the fourteenth amendment where state government is concerned; or under the fifth amendment where the federal government is concerned). Although the constitutional rights at stake are federal, state sovereign immunity will bar an action as a matter of law, since state law, not federal law controls in such situations.[31]

Speech

Protected free speech is limited to matters of public concern. Courts are split as to what kinds of speech deal with public concern. An applicant rejected for department chairman, who alleged she was retaliated against because she reported sexual harassment of students by a reading teacher to the principal and then to the department of social services when the principal took no disciplinary action, stated a section 1983 cause of action. Allegations that a teacher is taking sexual liberties with students "are of obvious concern to the community." The school district's compelling interest in restoring working relationships and in resuming regular operations was not sufficient to dismiss a complaint alleging a first amendment violation.[32] A school custodian transferred after making a speech to the school board on behalf of a principal charged with sexual harassment was entitled to a jury trial on the issue of free speech because his speech was a matter of public concern.[33] A superintendent's secretary, who was also the school board clerk, was ordered reinstated and a $22,000 judgment against the superintendent was upheld when the secretary was dismissed for objecting to school district patrons and some school board members to some features of a proposed bond issue. The secretary's speech was a matter of public concern and therefore protected by the first amendment. The superintendent's argument on appeal that the secretary's termination was justified because her remarks compromised a confidential employment relationship was rejected because the argument was not asserted at trial.[34] A satirical letter from a P.E. teacher to the school newspaper in response to an article alleging sex discrimination against girls in P.E. classes addressed a matter of public concern and, therefore, denial of his step increment in pay for the following school year violated his free speech rights.[35] A high school librarian who was to be transferred to another city high school after stating in a newspaper article numerous problems concerning teaching in an inner city high school was entitled to an injunction and $15,000 compensatory damages for emotional distress against both the school board and the superintendent because the librarian's comments were matters of public concern and the school board and superintendent failed to prove the librarian would have been transferred anyway if she had not participated in the article.[36] A cafeteria employee's complaints about unsanitary conditions in the school lunchroom and about serving spoiled food to students were matters of public concern and a school board rule prohibiting discussion of lunchroom problems with anyone except the principal violated the employee's free speech. Even though the employee dismissed her lawsuit after the board rule was abolished and before trial, "plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act" entitling plaintiff to attorneys fees under 42 U.S.C. section 1988.[37]

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[31] Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989).

[32] Cromley v. Board of Educ. of Lockport Township High School Dist. 205, 699 F. Supp. 1283, 1288 (N.D. Ill. 1988).

[33] Copp v. Unified School Dist. No. 501, 882 F.2d 1547 (10th Cir. 1989).

[34] Ware v. Unified School Dist. No. 492, Butler County, Kan., 881 F.2d 906 (10th Cir. 1989).

On the other hand, school employees lost where their statements did not address matters of important policy. A school employee's grievance about her failure to receive a pay increase did not address matters of public concern where the grievance did not concern school policy or the grievance procedure itself.[38] A statement by an employee, ultimately discharged for allegedly lying during an investigation concerning marijuana, that he did not know whether a quantity of marijuana found in his van belonged to a coworker was not a matter of public concern because it did not "constitute a grievance against his employer." The statement was "not made to further the public debate on employment discrimination, drug policy, or any other topic."[39] Finally, a principal's evaluation remark that a teacher was not to involve herself in problems which students had with other teachers and administrators did not burden free speech. The teacher's talking to students about their conversations with faculty members "was either trying to find out what other faculty members were saying about her or collecting information which she might later need for her lawsuit" and did not involve matters of public concern.[40]

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[35] Seemuller v. Fairfax County School Bd., 878 F.2d 1578 (4th Cir. 1989).

[36] Thompson v. Board of Educ. of the City of Chicago, 711 F. Supp. 394 (N.D. Ill. 1989).

[37] Luethje v. Peavine School Dist. of Adair County, 872 F.2d 352, 354 (10th Cir. 1989).

[38] Martinez v. Cotulla Indep. School Dist., 700 F. Supp. 17 (S.D. Tex. 1988).

[39] Arvinger v. Mayor of Baltimore, 862 F.2d 75, 78, 79 (4th Cir. 1988).

Occasionally, free speech may be claimed by a defendant against whom a school employee has a complaint. In one case a high school wrestling coach lost in his libel suit against a newspaper because an article stating he lied at a hearing was considered to be opinion protected by the first amendment.[41]

Association

The largest number of cases under this section continues to flow from the change of political parties in the 1984 Puerto Rican election. These cases are very much dependent on factual variations, especially as to whether discharged employees can produce evidence that an adverse employment decision was tied to membership in the political party which lost in the 1984 election. In two cases courts found evidence of political association discrimination[42] while two other courts found no such evidence.[43] All of the cases involved nontenured employees who were discharged or their position eliminated but one of the courts stated the constitutional standard in such cases: "[n]o distinction should be made between employees discharged from a permanent position and those who fail to receive a new appointment. [Neither can] be discharged in violation of the [f]irst [a]mendment right to free speech and association."[44]

In two other cases, courts split on violations of association rights. A teacher's constitutional right of association was violated where he was transferred in retaliation for filing a grievance under the collective bargaining contract. The grievance of the teacher "invoked collectively bargained procedures and was a constitutionally protected activity for which retaliation by public officials was prohibited."[45] In the other case, the coordinator of park and recreation programs for the city and its school system was a "political appointee" whose discharge allegedly for political reasons did not violate the first amendment. "Those the people elect are entitled to employ others who hold their confidence; they must do so if they are to carry out the programs they promised to pursue."[46]

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[40] Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736, 745 (S.D. Ga. 1989).

[41] Milkovich v. News-Herald, 545 N.E.2d 1320 (Ohio Ct. App. 1989).

[42] Marin-Piazza v. Aponte-Roque, 873 F.2d 432 (1st Cir. 1989); Caro v. Aponte-Roque, 878 F.2d 1 (1st Cir. 1989).

[43] Figueroa v. Aponte-Roque, 864 F.2d 947 (1st Cir. 1989); Saquebo v. Roque, 716 F. Supp. 709 (D. Puerto Rico 1989).

[44] Saquebo, 716 F. Supp. at 712.

[45] Stellmaker v. DePetrillo, 710 F. Supp. 891, 893 (D. Conn. 1989).

Privacy

The cases under this section represented diverse problems. A school system's mandatory drug testing by urinalysis of employees, including a bus attendant, involved in transportation of handicapped children had a compelling interest in deterring drug use on the job, outweighing fourth amendment privacy concerns.[47] United States Department of Education random urinalysis testing was permissible under the fourth amendment as to a guard to the Secretary of Education, department of motor vehicle operators, and employees who had access to top-secret information with national security implications, but was impermissible as an unconstitutional violation of privacy as to data processors who did not have access to sensitive information.[48] Regulations promulgated by a state department of education which provided that conviction for any felony or misdemeanor or other stationary traffic violation precludes employment at, or operation or ownership of, a preschool, did not violate right to privacy. The regulations at issue required not only background checks and criminal-record checks, but also fingerprinting of all owners and/or operators and all full or part-time employees.[49] Disclosure of information in personnel files to a newspaper must balance the need for disclosure against the public policy in favor of the confidentiality of private and personal information. In Connecticut, documents evaluating school teachers' performance were exempt from disclosure under state statute.[50]

Substantive Due Process

Violation of substantive due process tends to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive a school employee of a property or liberty right. A nontenured teacher who was nonrenewed after showing an "R" rated film to high school juniors lost her free expression claim when the court upheld the school principal's decision that the film was vulgar and sexually explicit and inappropriate for the classroom as determined by "the age and maturity of the students and the contents and quality of the films."[51] A terminated teacher failed to state a cause of action that he was discharged for exercise of first amendment rights when he alleged only that he was present at a committee meeting where the administration was criticized, not that he had criticized the school.[52] A school board could not avoid liability for enforcing an unconstitutional fair share fee procedure pursuant to a collective bargaining agreement on the basis that the board had delegated full authority to the union to determine and collect fair share fees.[53]

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[46] Bicanic v. McDermott, 867 F.2d 391, 395 (7th Cir. 1989).

[47] Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989).

[48] American Fed'n of Gov't Employees, AFL-CIO v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989).

[49] Henry v. Earhart, 553 A.2d 124 (R.I. 1989).

[50] Board of Educ. of Town of Somers v. Freedom of Information Comm'n, 556 A.2d 592 (Conn. 1989).

PROCEDURAL DUE PROCESS

The Supreme Court decision in *Cleveland Board of Education v. Loudermill*,[54] which set pretermination requirements for procedural due process, continues to be the important guideline in this section. A school bus driver with a one-year definite term contract who was effectively denied access to his bus had a protectable fourteenth amendment property right in his continued employment which was denied him when the school district failed to follow the *Loudermill* requirements. A subsequent meeting with school officials was inadequate where the assistant superintendent did not give the driver, prior to his termination, oral or written notice of specific charges against him, explanation of the school district's evidence, and an opportunity for the driver to present his side.[55]

Violation of procedural due process rights may not necessarily result in substantial damage awards. A black assistant principal who had not been granted *Loudermill* pretermination rights was entitled only to $1 nominal damages because the district court found he "would have been fired even if he had been accorded procedural due process." In addition, the appeals court upheld the 70% reduction in the attorneys fees award.[56]

Finally a teacher who had entered into an agreement with the New York Department of Correctional Services to settle a charge of excessive absences could be discharged without violating due process when she failed to report five days absence from work. Collective bargaining contract written disciplinary procedures could substitute for those in the state statute.[57]

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[51] Krizek v. Board of Educ. of Cicero-Stickney Township High School Dist. No. 201, Cook County, Ill., 713 F. Supp. 1131, 1139 (N.D. Ill. 1989).

[52] Michelin v. Jenkins, 704 F. Supp. 1 (D.D.C. 1989).

[53] Lowary v. Lexington Local Bd. of Educ., 704 F. Supp. 1430 (N.D. Ohio 1987).

[54] 470 U.S. 532 (1985).

[55] Tolson v. Sheridan School Dist., 703 F. Supp. 766 (E.D. Ark. 1988).

[56] Rogers v. Kelly, 866 F.2d 997, 1000 (8th Cir. 1989).

Liberty and Property Interests

Some cases implicate both property and liberty interests. A school superintendent suffered no deprivation of a protectable property interest when the school board voted tentatively to terminate him, pending his right to a hearing, because the board had provided him an "opportunity to present his side of the story" within the *Loudermill*[58] requirements. The superintendent's liberty interests were likewise not violated by the school board chair's description of him as "hostile and patronizing" or a statement that "we need not accept crumbs" because the comments were not "allegations of moral turpitude."[59] In another case, school board rules required applicants for administrative positions to pass both a written and oral interview. Failure of the oral interview did not permit one applicant to have the opportunity for a second interview, but did not violate his liberty or property interests where no such protectable rights had been created for an oral interview or a review of the first interview.[60]

Liberty claims very often relate to an employee's reputation. A school district employee had no liberty interest violation when a police officer incorrectly categorized the employee's guilty plea of contributing to the delinquency of a minor as "lewd and lascivious conduct" which required registration under state law. In denying a liberty interest violation, the court found no "stigmatizing public disclosure of the inaccurate charge . . . made in connection with termination of employment or the alteration of some right or status recognized by state law."[61]

Property interests must find their basis in some contractual or statutory entitlement. Thus, a probationary high school teacher who resigned during the first year of his contract in order to teach German during the spring term at a college out of state had no property interest in continued employment at his high school position.[62]

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[57] Millon v. Coughlin, 537 N.Y.S.2d 645 (App. Div. 1989).

[58] *Supra* notes 54 and 55.

[59] Adams v. School Dist. No. 5 of Jackson County Or., 699 F. Supp 243, 246, 247 (D. Or. 1988).

[60] Thomas v. Board of Examiners, Chicago Pub. Schools, 866 F.2d 225 (7th Cir. 1989).

[61] Kirk v. Hesselroth, 707 F. Supp. 1149, 1152 (N.D. Cal. 1989).

[62] Hankins v. Dallas Indep. School Dist., 698 F. Supp. 1323 (N.D. Tex. 1988).

Likewise, tenured teachers whose contracts were suspended as a result of reductions in enrollment[63] and a teacher aide terminated from employment[64] lacked property interests entitling them to pre-suspension or pre-termination hearings where applicable state statutes had failed to make such provision. In a similar vein, there were no property interest violations where a teacher received a two-day suspension with pay[65] or where a state statute required that all existing permanent teaching certificates be exchanged for five-year certificates renewable upon completion of continuing education.[66] A school principal whose two-year contract was not renewed did not have a property interest in employment under the Texas Contract Nonrenewal Act beyond the term of the contract.[67] Finally, a teacher had no entitlement under statute, ordinance, contract clause, or collective bargaining provision to be transferred to the position of her choice.[68]

However, some courts were able to find property interests protected by contract or statute. An employee originally hired under a contract terminable at will had a property interest under the school district handbook for classified employees permitting immediate dismissal only for enumerated acts of misconduct or for good cause.[69] A tenured teacher who produced evidence of recovery following a medical leave of absence was entitled under the state education code to reinstatement since the school board failed to produce evidence of incompetency.[70] Rescission of administrator increases at the beginning of the second of a three-year salary increase package was of sufficient magnitude to implicate due process considerations because "the constitutionally revered interest in continued employment must be to some degree intertwined with the economic fruits of that employment."[71]

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[63] Downs v. Henry County Bd. of Educ., 769 S.W.2d 49 (Ky. Ct. App. 1988).

[64] Harrison County School Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).

[65] Pitts v. Board of Educ. of U.S.D. 305, Salina Kan., 869 F.2d 555 (10th Cir. 1989).

[66] Connecticut Educ. Ass'n, Inc. v. Tirozzi, 554 A.2d 1065 (Conn. 1989).

[67] English v. Hairston, 888 F.2d 1069 (5th Cir. 1989).

[68] Lewandowski v. Two Rivers Pub. School Dist., 711 F. Supp. 1486 (E.D. Wis. 1989).

[69] Dickey v. Adams County School Dist. No. 50, 773 P.2d 585 (Colo. Ct. App. 1988).

[70] Raven v. Oakland Unified School Dist., 262 Cal. Rptr. 354 (Ct. App. 1989).

[71] Rockford Principals and Supervisors Ass'n v. Board of Educ. of Rockford School Dist. No. 205, 721 F. Supp. 948, 955 (N.D. Ill. 1989).

Aspects of Notice

Notice problems arose at both constitutional and statutory levels. A tenured teacher's request for a hearing in the state's multilevel hearing system was considered timely even though filed with the assistant superintendent instead of the Education Employees Grievance Board. The court in effect found the teacher's due process rights to notice and hearing prior to dismissal were violated when the notice of dismissal failed to include instructions as to where the request for a hearing was to be filed.[72] Reduction of school employee weekly hours from 44.5 to 40 hours to comply with FLSA constituted a "partial termination" under the state Fair Dismissal Act entitling employees to prior written notice of the reduction and opportunity for a hearing.[73]

Aspects of Hearing

Issues involving employee hearings arose under both state statutes and the Federal Constitution. A technical aide hired for the school year who received notice of termination in October was entitled to a formal hearing under the state Administrative Procedure Act because a substantial interest of a party was at issue.[74] A tenured fifth grade teacher excluded from a courtroom where his students were testifying regarding a charge of "unbecoming conduct," but who was provided with a closed-circuit television hookup, was denied his right under state law to confront his accusers.[75] A tenured teacher's state statutory right to a private hearing, at the teacher's request, on charges for dismissal was not violated when the school board voted in a public hearing to proceed with the charges in a private hearing.[76]

School employees both won and lost regarding constitutional challenges to aspects of hearings. A federal appeals court ruled unconstitutional an Oklahoma statute which required a discharged tenured teacher to pay 50% of the expenses of a statutory due process hearing and the cost of the official transcript because the teacher had a protectable property right and the statute imposed "a significant and unjustified open-ended penalty on the exercise of a constitutional right."[77] An award of $28,000 to a tenured teacher against a school board under a section 1983 claim for failing to provide the teacher with a fair dismissal hearing was upheld. Although the law affords a presumption of honesty and integrity to policymakers who possess decision-making powers, the teacher was able to prove that board members were biased by demonstrating discrepancies between (1) the members' claims at the hearing of no involvement in or familiarity with the case and (2) statements by witnesses at the trial regarding prehearing involvement by board members in attempts to encourage the teacher to resign and comments about the evidence against the teacher.[78]

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[72] Duruttya v. Board of Educ. of County of Mingo, 382 S.E.2d 40 (W. Va. 1989).

[73] Carter v. Baldwin County Bd. of Educ., 532 So. 2d 1017 (Ala. Civ. App. 1988).

[74] Taylor v. School Bd. of Seminole County, 538 So. 2d 150 (Fla. Dist. Ct. App. 1989).

[75] *In re* Wolf, 555 A.2d 722 (N.J. Super. Ct. App. Div. 1989).

[76] Halm v. Board of Educ. of the Dansville Agricultural Schools, 436 N.W.2d 680 (Mich. Ct. App. 1988).

One case featured a short-term loss for one teacher but a future long-term gain for all teachers. A tenured teacher whose discharge was affirmed by the state Tenure Commission was not denied due process by the fact that the attorney appointed by the school board to act as the hearing officer in disciplinary proceedings against the teacher was a member of the same firm as the attorney representing the school district because there was no evidence of actual bias. However, the court gave notice in the future that failure to appoint an independent attorney to serve as hearing officer will be subject to a *per se* rule of reversal because "the appearance of impropriety and the potential for prejudice are so great as to warrant such a *per se* rule."[79]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. A wide range of substantive and procedural issues pertaining to teacher discipline and the broad range of effects of teacher removal are reflected in this section.

One such issue arose in Virginia where the conclusion of a fact-finding committee, to which a dismissed teacher was statutorily entitled, that the teacher not be dismissed or placed on probation, was not binding on the school board and the teacher could be dismissed anyway by the board.[80] In Missouri where state statute requires a thirty-day curative period before a tenured teacher can be dismissed for incompetence, inefficiency, or insubordination, a local school board was not able to dismiss the teacher at the end of a thirty-day curative period because the board failed to produce evidence that the deficiencies had not been cured.[81] In Florida, demotion of a principal's continuing contract to an annual contract entitled him to constitutional due process but the demotion was upheld where he had received the statutory notice of charges and an administrative hearing.[82]

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[77] Rankin v. Independent School Dist. No. I-3, Noble County, Okla., 876 F.2d 838, 841 (10th Cir. 1989).

[78] Crump v. Board of Educ. of Hickory Admin. School Unit, 378 S.E.2d 32, 38 (N.C. Ct. App. 1989).

[79] Hagerty v. State Tenure Comm'n, 445 N.W.2d 178, 181 (Mich. Ct. App. 1989).

[80] Russell County School Bd. v. Anderson, 384 S.E.2d 598 (Va. 1989).

Courts split as to whether reasons given for employee termination were adequate. In Ohio, an appellate court upheld termination of a teacher on the basis of the teacher's past misconduct (gross inefficiency) even after a court had ordered the award of a new contract under which the teacher never served. Since a continuing contract is issued on statutory grounds alone, there can be no *res judicata* as to a charge of gross inefficiency when such conduct existed prior to the award of the contract.[83] In Massachusetts, an employment-at-will employee could be terminated for continued disagreement with an integral reorganization plan at a school where she worked. The "public policy" exception to discharge of employees-at-will was not so broad as to require just cause to terminate such an employee.[84]

On the other hand, termination for incompetency of a tenured teacher was reversed where charges of lack of organization and failure to provide activities and solicit help for remediation and enrichment of students lacked specificity required by the termination statute. In drawing a comparison between pleading and discovery the court observed that "[i]n teacher termination proceedings . . . where discovery is not provided, the charges must perform the office of discovery in pinpointing the allegations."[85] The South Dakota Supreme Court affirmed reinstatement with full-time benefits and back pay of a tenured teacher who had been terminated for two occasions of inappropriate language in the presence of students. The school board's action in refusing to renew the tenured teacher was arbitrary and capricious where a standard of conduct was applied differently to the terminated teacher than to another teacher and where the superintendent violated the state's confidentiality statute and

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[81] Selby v. North Callaway Bd. of Educ., 777 S.W.2d 275 (Mo. Ct. App. 1989).

[82] Edgar v. School Bd. of Calhoun County, 549 So. 2d 726 (Fla. Dist. Ct. App. 1989).

[83] Sylvania Educ. Ass'n v. Sylvania City Schools, 541 N.E.2d 1060 (Ohio Ct. App. 1988).

[84] Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 533 N.E.2d 1368 (Mass. 1989).

[85] Jefferson Consol. School Dist. v. Carden, 772 S.W.2d 753, 759 (Mo. Ct. App. 1989).

FERPA in his disciplinary action of the teacher.[86] In a case resolved on a procedural question, a tenured teacher discharged for immoral conduct because of explicit, crude, and tasteless sexual references in the student newspaper was entitled to litigate the issue of his discharge because prior disallowance of unemployment benefits by an administrative board was decided on a different question of substantial disregard of the employer's interest.[87]

Two cases involved interpretations of collective bargaining agreements. A temporary teacher who was terminated for an unsatisfactory rating was not entitled to have his termination arbitrated under the collective bargaining contract because the contract specifically stated that claims involving teacher ratings were not subject to arbitration and, in addition, a termination under these facts was not "discipline" under the contract, which was arbitrable.[88] A school safety officer who was terminated for using abusive language toward female students was not entitled to a remedy at law where the collective bargaining contract provided for a four-step grievance procedure and the officer had appealed only through the first two steps.[89]

Two cases raised ancillary issues. A teacher who had resigned his position, effective at the end of his first year of teaching rather than go through the nonrenewal process, was considered to have left "voluntarily" and was thus ineligible for unemployment compensation benefits.[90] A tortious interference of contract action would not lie against the superintendent and school board members where the basis of plaintiff-principal's demotion to teacher was the superintendent's evaluations made to the board and where plaintiff failed to plead that the superintendent was motivated by malice.[91]

Insubordination

School boards were both successful and unsuccessful in terminating employees for insubordination. An elementary teacher who refused to attend P.T.A. and faculty meetings and to give a report card to a student when directed to do so was guilty of insubordination and could be dismissed.[92] Similarly, an assistant naval science instructor's refusal on two occasions to conduct extended NJROTC field trips as directed by the principal constituted insubordination for which the instructor could be dismissed from his tenured teaching position.[93] However, a school superintendent who refused to provide, after three requests from the school board at a board meeting, recommendations for a new basketball coach was not insubordinate or willfully neglectful of his duties when he responded that he needed more information from the community. Failure to nominate someone as a coach of an important school and community sport that does not start for two or three months in order to obtain more information does not rise to the level of insubordination.[94]

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[86] Jager v. Ramona Bd. of Educ., Ramona School Dist., 444 N.W.2d 21 (S.D. 1989).

[87] Gerig v. Board of Educ. of the Cent. School Dist., R-III, 767 S.W.2d 586 (Mo. Ct. App. 1988).

[88] Mifflin County School Dist. v. Lutz, 551 A.2d 396 (Pa. Commw. Ct. 1988).

[89] Cantres v. Board of Educ. of City of N.Y., 535 N.Y.S.2d 714 (App. Div. 1988).

[90] Six v. Job Serv. N.D., 443 N.W.2d 911 (N.D. 1989).

[91] Franklin v. Harris, 762 S.W.2d 847 (Mo. Ct. App. 1989).

[92] Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W. Va. 1989).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

School boards were generally successful in disciplining or removing employees under this broad category. A high school principal's demotion was upheld as a result of failing to put in writing his expectations for administrative and security staff despite repeated requests to do so, failing to develop a written hall supervision schedule despite repeated requests to do so, and failing to develop an overall building security plan that identified the roles of administrative staff, security guards, and teachers.[95] A tenured elementary teacher could be fined $2,500 for misconduct when she directed one of her students to leave the classroom to call her mother, as a result of which the teacher left the classroom during school hours to meet with the mother to discuss how a traffic ticket issued to the teacher by the mother's husband could be eliminated.[96] A tenured teacher could be discharged for violating the school district's policy against corporal punishment when he slapped or hit several students over a four-year period.[97] A nontenured teacher's dismissal for permitting third grade students to hit or kick other students as part of a classroom "game" and for grabbing a child's shoulder hard enough to cause pain constituted unprofessional conduct and dismissal, rather than a ten-day suspension permitted under state statute, was reasonable under the facts.[98]

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[93] Toole v. Jones, 778 S.W.2d 376 (Mo. Ct. App. 1989).

[94] State *ex rel.* Blackwell v. Wyoming County Bd. of Educ., 375 S.E.2d 25 (W. Va. 1988).

[95] Franklin v. Board of Directors, School Dist. of Kan. City, 772 S.W.2d 873 (Mo. Ct. App. 1989).

[96] Sperling v. Board of Educ. of Poughkeepsie City School Dist., 541 N.Y.S.2d 242 (App. Div. 1989).

[97] Tomczik v. State Tenure Comm'n, 438 N.W.2d 642 (Mich. Ct. App. 1989).

[98] Roberts v. Santa Cruz Valley Unified School Dist. No. 35, 778 P.2d 1294 (Ariz. Ct. App. 1989).

However, school board discipline and dismissal efforts were not always successful. A tenured teacher who had a seventeen year unblemished teaching record and who had imposed against him a suspension without pay for six months due to four acts unbecoming a teacher (i.e., inappropriate choice of language towards students) received a penalty "disproportionate to the offense as to be shocking to one's sense of fairness."[99] A school principal who had taken a trip authorized by the school board as a single trip, but who subsequently charged the school district for a double room occupied by himself and a female friend, was entitled to be reinstated after being dismissed for misconduct. Because past practice had permitted taking a guest and because the principal had an otherwise exemplary twenty-five-year record, the board acted arbitrarily in dismissing him; however, the principal had to reimburse the school board for the expense of his guest and he was reinstated without back pay.[100]

A New York case discussed the matter of proof comparing the Penal Code to teacher dismissal. A school district was not required to prove by a preponderance of the evidence each element of assault in the third degree as found in the Penal Code to support a dismissal for misconduct after a teacher had kicked a student.[101]

Immorality

Three cases with quite diverse issues arose under this section. Dismissal of a teacher for massaging the backs and chests of female high school students and for attempted sexual intercourse with them was justified under the statutory ground of immorality as a basis for dismissal.[102] A settlement agreement between a tenured teacher and a school board whereby the teacher agreed to resign in return for the district's prohibition from divulging information regarding the teacher's pedophilia was held to be void as against public policy.[103] In South Dakota, a school district which dismissed a tenured teacher with twenty-five years teaching experience for sexual contact with a current student could properly admit testimony of a student who had graduated four years earlier regarding the teacher's sexual advances toward her under the "prior bad acts" evidence rule.[104]

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[99] McFadden v. Board of Educ. Nanuet Union Free School Dist., Rockland County, 544 N.Y.S.2d 885, 886 (App. Div. 1989).

[100] Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989).

[101] Aronsky v. Board of Educ., 541 N.Y.S.2d 552 (App. Div. 1989).

[102] Johnson v. Board of Trustees, Beaverhead County High School Dist., 771 P.2d 137 (Mont. 1989).

[103] Bowman v. Parma Bd. of Educ., 542 N.E.2d 663 (Ohio Ct. App. 1988).

Incompetence

One case under this section dealt tangentially with the issue of incompetence. Under state law, a tenured teacher who took a medical leave of absence for longer than thirty days because of work related stress or mental illness was entitled to return to work upon submission of medical evidence of recovery. The burden then shifted to the school to prove incompetence if the board wanted to deny return to work. But requiring the teacher to be approved by the district's physician before she could return to work violated state law and the teacher's due process, entitling her to reinstatement and backpay.[105]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. A special education administrator whose annual contract had not been renewed after three years had not been "removed or discharged" within the meaning of a statute governing right to notice, but since tenure did not attach until issuance of the fourth annual contract, the administrator had no property right to continued employment.[106] A dismissed teacher was not required to be reinstated under state law because some of the reasons relied upon by the superintendent for dismissal were not substantiated, as long as some of the reasons could be substantiated.[107] In Louisiana, basic skills strategists were administrators/consultants under a state statute prohibiting such persons from being paid a lower salary than the previous year, but a reduction in work year and administrative pay supplement of the basic skills strategists did not constitute a "removal from office" so as to invoke the protective safeguards of the tenure act.[108]

Two cases involved claims for unemployment compensation benefits flowing from school board action. Discharge of a teacher who failed to complete professional education credits required for a teaching certificate constituted a "provoked discharge" under state law making the teacher ineligible for benefits.[109] A high school bookkeeper, dismissed because of chaotic bookkeeping problems that included unpaid overdue bills, improperly entered ledger accounts and unaccounted for funds, was not entitled to unemployment compensation because her discharge had been for misconduct in connection with work.[110]

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[104] Strain v. Rapid City School Bd. for Rapid City Area School Dist., 447 N.W.2d 332 (S.D. 1989).

[105] Raven v. Oakland Unified School Dist., 254 Cal. Rptr. 37 (Ct. App. 1988).

[106] Costello v. School Comm. of Chelsea, 544 N.E.2d 594 (Mass. App. Ct. 1989).

[107] Thomas v. Cascade Union High School Dist. No. 5, 780 P.2d 780 (Ore. Ct. App. 1989).

[108] Brooks v. Orleans Parish School Bd., 550 So. 2d 1267 (La. Ct. App. 1989).

A tenured school counselor, who was considered for federal income tax purposes to be an independent contractor as a member of a religious order living a life of poverty and chastity under obedience, was nonetheless an employee of the school district; dismissal of the counselor without following procedures under the tenure statute resulted in damages of $63,245.13.[111]

Courts have upheld a wide range of school board decisions and policies made pursuant to state statutes: discharge of a tenured teacher with long-standing emotional and behavioral problems who did not come under the statutory prohibition of dismissal of teachers with temporary disabilities;[112] nonrenewal of a probationary superintendent where the number of required evaluations substantially complied with the statutorily mandated three evaluations per year;[113] refusal to reemploy a teacher who had resigned pursuant to a settlement agreement whereby a school board agreed not to proceed with a termination hearing;[114] refusal to furnish to a nontenured teacher a reason for nonrenewal where state statute required request for such reason occur within ten days of notice of nonrenewal;[115] refusal to furnish a reason for nonrenewal to a nonrenewed teacher who failed to exhaust grievance procedures under the collection bargaining agreement;[116] discharge of a probationary teacher for establishing a staggered attendance system contrary to explicit instructions of the principal and superintendent, leaving school without permission, and abruptly leaving a meeting with the principal and superintendent;[117] denial of accidental disability retirement to an injured employee;[118] transfer of a principal to a teaching position;[119] discharge of a teacher who was unable to take advantage of state statute providing for remediations because of extended illness;[120] nonrenewal of probationary superintendent where the school board had performed the minimal required number of statutory evaluations;[121] and nonrenewal of a school district's Director of Maintenance and Director of Financial Affairs/Business Manager without notice of nonrenewal and opportunity for a hearing because the employees were not "teachers" under the state's Term Contract Nonrenewable Act.[122] An Illinois statute which requires school boards to initiate or develop remediation programs for teachers with unsatisfactory evaluations was interpreted to mean that school administrators could perform such functions instead of the State Board and that a teacher was not improperly dismissed where his plan had been designed and evaluated by his school administrator.[123] In a somewhat unrelated, but nonetheless interesting and novel, case, removal of a school board member was upheld as a result of a criminal conviction during his term in office.[124]

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[109] *In re* Hannah, 534 N.Y.S.2d 752 (App. Div. 1988).

[110] Craft v. Virginia Employment Comm'n, 383 S.E.2d 271 (Va. Ct. App. 1989).

[111] Beine v. Board of Educ. of Cabell County, 383 S.E.2d 851 (W. Va. 1989).

[112] Beechwood v. Board of Educ. of School Dist. No. 11, 767 P.2d 1234 (Colo. Ct. App. 1988).

[113] Allen v. Board of Educ. of Indep. School Dist. No. 582, Jasper, Minn., 435 N.W.2d 124 (Minn. Ct. App. 1989).

[114] Branch v. Greene County Bd. of Educ., 533 So. 2d 248 (Ala. Civ. App. 1988).

[115] Keller v. School Dist. No. 5, 774 P.2d 409 (Mont. 1989).

[116] Thompson v. Board of Trustees of School Dist. No. 2, Yellowstone County, 774 P.2d 412 (Mont. 1989).

A number of cases have found that school board actions have not complied with state law: termination of an athletic director assignment without following statutory nonrenewal procedures where the following year's contract involved not only elimination of the compensation for the athletic director but also a 1/7 reduction in base teaching salary;[125] laying off janitorial employees without following statutory lay-off procedures;[126] termination of a superintendent pursuant to his oral resignation where state statute required the resignation be submitted in writing;[127] discharge of a school cafeteria employee without giving written charges of grounds for dismissal, even though the employee was excluded from the state's tenure law;[128] failure of the school board to select within the statutory time limit a member of the review panel to consider a discharged employee's appeal, which resulted in reinstatement on the grounds that the board was considered to have abandoned its attempt to terminate the employee;[129] failure of a school board to hold an appeal hearing within a sixty-day statutory limitation;[130] and refusal by a school board to move a tenured elementary teacher up the salary scale based on teaching experience and education without according the teacher the same statutory procedural right applicable to termination.[131]

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[117] Ford v. Caldwell Parish School Bd., 541 So. 2d 955 (La. Ct. App. 1989).

[118] Maynard v. Board of Trustees of Teachers' Pension and Annuity Fund, 549 A.2d 1213 (N.J. 1988).

[119] Odegaard v. Everett School Dist. No. 2, 780 P.2d 260 (Wash. Ct. App. 1989).

[120] Blake v. Commission on Professional Competence, 260 Cal. Rptr. 690 (Ct. App. 1989).

[121] Tornow v. Board of Educ. of Indep. School Dist. No. 118, Remer, Minn., 435 N.W.2d 142 (Minn. Ct. App. 1989).

[122] Hightower v. State Comm'r of Educ., 778 S.W.2d 595 (Tex. Ct. App. 1989).

[123] Powell v. Board of Educ. of City of Peoria, Dist. 150, 545 N.E.2d 767 (Ill. App. Ct. 1989).

[124] State v. Spooner, 532 So. 2d 530 (La. Ct. App. 1988).

[125] Coles v. Glenburn Pub. School Dist. No. 26, 436 N.W.2d 262 (N.D. 1989).

[126] State v. Spurlock, 537 N.E.2d 641 (Ohio 1989).

[127] Petrella v. Siegel, 537 N.Y.S.2d 124 (1988).

One case represented a clear victory for neither teacher nor school board. The sole remedy for a probationary teacher who had not received notice of nonrenewal as required by state statute was an action of entitlement to a contract for the following year, but the teacher was not permitted under state law to pursue her current action for money damages.[132]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and/or collective bargaining agreements. RIFed employees normally do not have a legitimate claim of entitlement to positions that invokes constitutional due process, but substantive criteria and procedures specified by state law must be followed. Thus, teachers at an area vocational school subject to RIF because of program changes and declining enrollments were considered to be teachers in a higher education institution and, consequently, entitled to due process procedures under the Higher Education Process Act in effect at that time.[133] However, a teacher of remedial reading and math in a federally funded chapter I program, who was employed on a year-to-year basis and paid with federal funds, was not covered by the school board's reduction-in-force policy which required the school board to avoid dismissal of teachers, if possible, by absorbing them within the system.[134]

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[128] Winston v. Orleans Parish School Bd., 545 So. 2d 1174 (La. Ct. App. 1989).

[129] Washington v. Bessemer Bd. of Educ., 547 So. 2d 888 (Ala. Civ. App. 1989).

[130] Hawkins v. McCain, 549 So. 2d 1345 (Ala. Civ. App. 1989).

[131] Long v. School Dist. of Univ. City, 777 S.W.2d 944 (Mo. Ct. App. 1989).

[132] School Bd. of City of Norfolk v. Giannoutsos, 380 S.E.2d 647 (Va. 1989).

[133] Burreson v. Boulder Valley School Dist., 764 P.2d 412 (Colo. Ct. App. 1988).

Necessity for Reduction-in-force

Three cases revealed that courts do scrutinize carefully the necessity for RIF. In one case, a 4% decline in total student enrollment over four years did not justify elimination of one of three school nurse positions, a 33 1/3% reduction in staff.[135] In a second case, a court determined that when a school board decides to suspend a tenured teacher's contract only a few weeks before the start of a new school year, it (the court) can look at enrollment before and after suspension in order to determine whether a decline indeed existed during and immediately following the year of suspension. In this case a long-term enrollment decline that had ceased the year before the tenured teacher's contract was suspended did not justify suspension of the contract because enrollment was now increasing at the high school in which the teacher taught.[136] On the other hand, a school board did not have to look across its entire budget in pursuing reduction-in-force and thus could reduce the teaching staff in the exceptional children program for which funds had been significantly decreased where the major use of such funds had been for staff salaries and the program quality could be maintained with fewer teachers.[137]

Elimination of Position

Cases in this section tend to overlap with the issue of selecting the employees to be retained as discussed under the next section. Two teachers terminated when two of five teaching positions in health sciences were eliminated were ordered to be reinstated on the basis that a provision in the collective bargaining agreement, requiring that teaching time in other areas be included in determining seniority, violated the state's education law section providing that services of a teacher having the least seniority within a tenure position were to be discontinued upon elimination of a position.[138]

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[134] Abbott v. Claiborne Parish School Bd., 550 So. 2d 294 (La. Ct. App. 1989).

[135] Leu v. Newton Community School Dist., 441 N.W.2d 408 (Iowa Ct. App. 1989).

[136] Phillips v. South Range Local School Dist. Bd. of Educ., 543 N.E.2d 492 (Ohio 1989).

[137] Taborn v. Hammonds, 380 S.E.2d 513 (N.C. 1989).

[138] Szumigala v. Hicksville Union Free School Dist. Bd. of Educ., 539 N.Y.S.2d 83 (App. Div. 1989).

Selection of Employees

All of the cases in this section deal with interpretation of state law and sometimes those interpretations could involve extremely technical aspects. An industrial arts teacher who had taken a temporary approved leave of absence to accept a nonprofessional public relations position did not lose his seniority as a professional employee and thus he was improperly furloughed as the least senior nonprofessional employee when a nonprofessional position was eliminated.[139] A tenured teacher with certification as a psychometrist had her contract improperly cancelled when a new position of psychometrist/counselor was filled by a nontenured teacher who was not certified as a psychometrist.[140] Under Pennsylvania law a school board improperly furloughed a guidance counselor and assigned a classroom teacher to that position because even though the teacher had more years seniority he had no experience as a guidance counselor.[141] A tenured auto mechanics teacher whose shop classes had been eliminated, but who was also certified in social sciences, was improperly nonrenewed when a nontenured teacher was hired to teach social science courses.[142] Under Michigan law, tenured teachers who held counselor positions were not entitled to position-specific tenure and their positions could be filled by tenured teachers who had greater seniority but who had not been assigned previously as counselors.[143] In a case controlled by language in the collective bargaining agreement, a school board acted correctly in terminating a tenured teacher based on departmental rather than district-wide seniority.[144] In a case of a procedural nature, a director of the school's driver education program, who taught driver's education during the nine-month school year and then during the summer on a special contract, was entitled to both sixty days notice under the continuing contract statute and assignment based on seniority when the school district sought to give the summer assignment to an administrator with less seniority.[145]

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[139] Waslo v. North Allegheny School Dist., 549 A.2d 1359 (Pa. Commw. Ct. 1988).

[140] Stewart v. Fort Wayne Community Schools, 545 N.E.2d 7 (Ind. Ct. App. 1989).

[141] Wattsburg Area School Dist. v. Jarrett, 550 A.2d 1379 (Pa. Commw. Ct. 1988).

[142] Bauer v. Board of Educ., Unified School Dist. No. 452, 765 P.2d 1129 (Kan. 1988).

[143] Belanger v. Warren Consol. School Dist. Bd. of Educ., 443 N.W.2d 372 (Mich. 1989).

[144] Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 553 A.2d 913 (Pa. 1989).

[145] Duncan v. Board of Educ. of United Township High School Dist. No. 30, 532 N.E.2d 927 (Ill. App. Ct. 1988).

Two cases related to assignment of employees and certification. In assigning a teacher to fill a needed area, a school board could assign a nontenured teacher certified in the needed area rather than a tenured teacher who did not acquire certification in the area until the summer following the assignment because the controlling date for certification was April 10, the date by which nonrenewal notices had to be sent.[146] Similarly, a school board in another state was required to consider certification at the time furlough decisions had to be made, and thus did not have to consider an additional certification a teacher claimed he would have by the time school started in the fall.[147]

Realignment/Reassignment

Generally, courts have found that school board realignments or reassignments were improperly accomplished. Minnesota follows the judicial interpretation of state statute that a multiple licensed more senior teacher has to be reassigned if the reassignment will permit a less senior teacher to be retained in his area of licensure.[148] Such protection of seniority must also apply when reinstating teachers from unrequested leaves of absence.[149] However, the judicial interpretation of state statute can be obviated by a collective bargaining agreement and thus a teacher who lost .57 of his teaching assignment credits according to the agreement had no cause of action under state statute since the agreement was considered to have removed the statutory duty to realign.[150] In addition, a school board had no obligation to create a full-time position for a tenured teacher assigned part-time to teaching title I classes where all such classes were taught only in the morning.[151]

In other cases, a teacher was entitled to reinstatement when her suspension resulted from the school board improperly deleting an area of certification for another teacher which had the effect of making the other teacher more senior.[152] A teacher who requested and re-

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146. Butler v. Board of Educ., Unified School Dist. No. 440, 769 P.2d 651 (Kan. 1989).

147. Whitling v. Keystone School Dist., 560 A.2d 909 (Pa. Commw. Ct. 1989).

148. Heruth v. Independent School Dist. No. 11, 434 N.W.2d 470 (Minn. Ct. App. 1989).

149. Harms v. Independent School Dist. No. 300, La Crescent, 441 N.W.2d 522 (Minn. Ct. App. 1989).

150. Destache v. Independent School Dist. No. 832, 434 N.W.2d 270 (Minn. Ct. App. 1989).

151. *In re* Independent School Dist. No. 318, 435 N.W.2d 81 (Minn. Ct. App. 1989).

152. McKeesport Area School Dist. v. Cicogna, 558 A.2d 116 (Pa. Commw. Ct. 1989).

ceived from the school board medical leave resulting from stress in teaching special education was entitled under her contract and state statute to be assigned to an open regular elementary classroom position for which she was certified and which did not create stress-related medical problems.[153]

Call Back Rights

Call back rights are generally controlled by collective bargaining agreements and state certification requirements. An excessed elementary teacher on a preferred eligible list was not entitled to recall to a vacant elementary position where she was not certified to teach remedial reading, a required qualification for the position.[154] However, a tenured teacher who had acquired an additional endorsement in learning disabilities while furloughed was entitled to recall to a learning disabilities position ahead of probationary teachers with less seniority.[155] A school employer has the right to fill a position with one employee rather than divide a position to accommodate an employee on the call-back list who wants only a part-time position.[156] Placement of a teacher's name on a call-back list, if the nonrenewal was due to RIF, may be a right under the collective bargaining agreement,[157] but a school board can still have discretion in determining whether a position is "open" for call-back purposes, such as where the school board anticipates that an ill teacher will return for the following year.[158]

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employee's contract and differing interpretations of the provisions in that contract tend to foster litigation. Collective bargaining contracts furnish the matrix for lawsuits. Collective bargaining contract provisions prevailed over school board decisions where the contract required the school district to point out weaknesses and make suggestions for improvement of probationary candidates for tenure prior to termination[159] and where the contract required arbitration of seniority disputes between teachers with regard to transfers.[160] Collective bargaining contracts were held not to be impediments to school board decisions where the board refused to pay additional compensation to teachers who worked during days rescheduled for those missed because of snow[161] and where a contract provision requiring binding arbitration of grievances was not enforceable as to a probationary teacher whose reemployment was considered solely a decision for the board.[162] School board decisions were upheld in the following cases where the collective bargaining contract contained no applicable provision: assignment of a high school teacher to a six-period teaching day even though school policy called for five periods of teaching;[163] and refusal to pay additional compensation to teachers assigned to hallway duty during lunch time even though teachers assigned to lunchroom duty received additional compensation.[164]

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[153] Jay School Corp. v. Cheeseman, 540 N.E.2d 1248 (Ind. Ct. App. 1989).

[154] Dionisio v. Board of Educ. of Mahopac Cent. School Dist., 538 N.Y.S.2d 47 (App. Div. 1989).

[155] Hodgeson v. Board of Educ. of Buena Vista School Dist., 438 N.W.2d 295 (Mich. Ct. App. 1989).

[156] Murray v. Sonoma County Office of Educ., 256 Cal. Rptr. 353 (Ct. App. 1989).

[157] Tye v. Board of Educ. of Polaris Jt. Vocational School Dist., 541 N.E.2d 466 (Ohio Ct. App. 1988).

[158] Flemmer v. Tammany Elementary School Dist. No. 343, 774 P.2d 914 (Idaho Ct. App. 1989).

Frequently, school district contractual decisions are affected by statutory provisions. A state statute, which set the certificated salary schedule and which in turn did not prevent salary increases by local school boards beyond the state schedule, was interpreted as prohibiting a local school board from reducing its contributions to the superintendent when the state salary was increased.[165] In two other cases, a school district was required to reinstate a teacher whose long-term substitute contract in another district while she was on extended leave of absence was not considered to be a breach of her continuing contract[166] and a school district could not break up statutorily required daily planning periods into segments less than the length of a normal class period.[167] In two similar cases, a school bus driver, who drove school bus routes under two separate contracts, was entitled to only one $1,000 salary increase under a statute which provided a $1,000 salary increase for each bus driver position,[168] while noninstructional personnel working as both secretaries and lunchroom managers were likewise entitled to only one such pay increase, even if they worked twenty hours or more at each job.[169] Finally, a state statute requiring a supplemental contract of employment for services other than those in the principal contract of employment did not require additional compensation for supervising children at noon recess.[170]

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[159] Board of Educ. of Patchogue-Medford Union Free School Dist. v. Patchogue-Medford Congress of Teachers, 535 N.Y.S.2d 57 (App. Div. 1988).

[160] Alexander Local School Dist. Bd. of Educ. v. Alexander Local Educ. Ass'n, 534 N.E.2d 107 (Ohio Ct. App. 1987).

[161] Halley v. Board of School Trustees of Blackford County School Corp., 531 N.E.2d 1182 (Ind. Ct. App. 1988).

[162] Mindemann v. Independent School Dist. No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989).

[163] Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 433 N.W.2d 566 (S.D. 1988).

[164] Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 446 N.W.2d 770 (S.D. 1989).

[165] Bedford County Bd. of Educ. v. Harris, 763 S.W.2d 750 (Tenn. Ct. App. 1988).

[166] Dokmo v. Independent School Dist. No 11, Anoka-Hennepin, 443 N.W.2d 231 (Minn. Ct. App. 1989).

[167] Gant v. Waggy, 377 S.E.2d 473 (W. Va. 1988).

School district action can also be affected by individual contract language. Courts interpreting the language of individual contracts held for school boards where: the school board treasurer by contract was a "nonteaching employee" and as such was not entitled to pay for unused vacation leave;[171] a release negotiated between a teacher and the school board for all claims "whether known or unknown" could not be invalidated in the absence of fraud, coercion, or duress;[172] and where contract language for fifteen years between the school board and superintendent expressly and unequivocally precluding him from obtaining tenure rights was enforceable even though the board had failed to authorize the current contract.[173] Courts interpreting the language of individual contracts held against school boards where: a school board tried to refuse payment of terminal pay for accumulated sick leave because ten of the teacher's sixteen years service were in another school district in the same state;[174] a board's order to a tenured teacher, who was also director of an area vocational school, to teach at a high school amounted to an improper termination or modification of his contract;[175] a school board served notice of termination to thirty-seven employees in violation of a settlement agreement;[176] a school board cancelled a superintendent's three-year contract after the first year and declared vacant the position of superintendent of schools without notice or a hearing;[177] and a school board sought to terminate a probationary administrative employee contrary to contract language providing termination for cause and written notice prior to discharge.[178]

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[168] Machen v. Scottsboro City Bd. of Educ., 537 So. 2d 27 (Ala. Civ. App. 1988).

[169] Sellers v. Lowndes County Bd. of Educ., 550 So. 2d 1021 (Ala. Civ. App. 1989).

[170] NEA-Goodland v. Board of Educ., U.S.D. No. 352, Sherman County, 775 P.2d 675 (Kan. Ct. App. 1989).

[171] Erkkila v. Painesville Township Bd. of Educ., 535 N.E.2d 385 (Ohio Ct. App. 1987).

[172] Harrison v. Arlington Indep. School Dist., 717 F. Supp. 453 (N.D. Tex. 1989).

[173] Thorin v. Bloomfield Hills School Dist., 445 N.W.2d 448 (Mich. Ct. App. 1989).

[174] Pitts v. Bay County School Bd., 540 So. 2d 157 (Fla. Dist. Ct. App. 1989).

[175] *Ex parte* Ezell, 545 So. 2d 52 (Ala. 1989).

[176] Thomas v. Board of Educ. of McDowell County, 383 S.E.2d 318 (W. Va. 1989).

[177] Lewiston-Porter Cent. School Dist. v. Sobol, 546 N.Y.S.2d 227 (App. Div. 1989).

In a final category school boards were held to have exceeded their discretion where: a school board failed to hire a clearly better qualified applicant when the applicant's personnel file contained no documentation to support its reasons for not hiring her;[179] a board refused to permit a teacher to resign his coaching responsibilities when the board had no established policy on assigning extra duties;[180] and a board sought to retract a year's credit it had granted which would have had the effect of reducing a teacher one step on the salary scale.[181]

Administrative Regulations and Statutory Provisions

School board actions have implicated a wide variety of state and federal statutes. An "on-call" substitute teacher was not eligible for unemployment compensation benefits because his employment relationship with the school district had not altered and he was therefore still considered an employee under state statute.[182] Similarly, a football coach who had injured his leg during a game which resulted in amputation was considered to be an independent contractor and thus not eligible for unemployment compensation benefits.[183] Likewise, a teacher was considered to have left her job "for cause of a necessitous and compelling nature," and would thus be eligible for unemployment compensation benefits, after she voluntarily quit to be with her husband who had taken a job 100 miles from home.[184]

In Alabama, a state constitutional provision prohibiting elected public officers from participating in the Employee Retirement System was held not to apply to elected school superintendents because they served under county boards of education.[185] In New York, new state regulations establishing minimum operating standards for hospitals were not arbitrary, capricious, or an abuse of discretion in requiring the hiring of additional staff unavailable from the labor pool because the new staffing requirements could be complied with by restructuring schedules and implementing hospital-specific procedures.[186]

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[178] Averback v. Board of Educ. of New Paltz Cent. School Dist., 541 N.Y.S.2d 655 (App. Div. 1989).

[179] State *ex rel.* Oser v. Haskins, 374 S.E.2d 184 (W. Va. 1988).

[180] Lewis v. Board of Educ. of N. Clay Community Unit School Dist. No. 25, 537 N.E.2d 435 (Ill. App. Ct. 1989).

[181] State v. Windham Exempted Village School Dist. Bd. of Educ., 537 N.E.2d 646 (Ohio 1989).

[182] Texas Employment Comm'n v. Southside Indep. School Dist., 775 S.W.2d 733 (Tex. Ct. App. 1989).

[183] Lynch v. Workmen's Compensation Appeal Bd., 554 A.2d 159 (Pa. Commw. Ct. 1989).

[184] Mechanicsburg Area School Dist. v. Commonwealth, 551 A.2d 401 (Pa. Commw. Ct. 1988).

[185] Edmonds v. Bronner, 547 So. 2d 1172 (Ala. 1989).

A workers' compensation case was decided for the employee where a bookkeeper for two educational agencies was determined to be eligible for benefits after her nonrenewal by one agency resulted in her losing benefits from the second agency since she had now fallen below thirty hours per week.[187] However, a workers' compensation claimant who had refused to make herself available for modified work while receiving disability payments could be denied workers' compensation where her physician had recommended she return to work and the Workers' Compensation Bureau's request to return to work was a reasonable attempt to test the claimant's limitations under proposed modifications of her job.[188]

Several cases dealt with a broad category of employee benefits. A teacher, who had taught six years before quitting and withdrawing his contributions to the state teacher's retirement system fund, was entitled, upon resuming teaching again the next year, to three years creditable service for purpose of calculating retirement benefits.[189] A teacher assigned to teach music during her first year was not eligible for assignment to level two in the career ladder statute because one of her second year assignments was a special study hall for disciplinary problems which involved no teaching or student evaluation.[190] Under California's Educational Employment Relations Act a school district was prohibited from withholding from a nonunion member's paycheck the portion of a service fee used for union activities beyond the union's representational obligations.[191] In New York, a state regulation which permitted those compensated under a nonadministrative teacher salary schedule, but not under an administrative or supervisory salary schedule, to be eligible for excellence in teaching set-aside grants was held to be violative of the equal protection clause.[192] In two sick leave cases involving maternity, one teacher was able to use sick leave beyond the customary six-week period because the sick leave was related to a statutory reason, "pregnancy,"[193] while in another case a teacher was not entitled to five weeks maternity leave with pay where state statute allowed, but did not require, city school boards to grant additional sick leave.[194]

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[186] Hospital Ass'n of N.Y. State v. Axelrod, 546 N.Y.S.2d 531 (Sup. Ct. 1989).

[187] Isabelle v. Department of Employment and Training, 554 A.2d 660 (Vt. 1988).

[188] Risch v. North Dakota Workers Compensation Bureau, 447 N.W.2d 308 (N.D. 1989).

[189] Schmidt v. Wisconsin Employee Trust Funds Bd., 436 N.W.2d 918 (Wis. Ct. App. 1989).

[190] Moore v. Central Educ. Agency, 768 S.W.2d 1 (Tex. Ct. App. 1989).

[191] Cumero v. Public Employment Relations Bd., 262 Cal. Rptr. 46 (Cal. 1989).

[192] Schneider v. Sobol, 546 N.Y.S.2d 221 (App. Div. 1989).

In two peripheral cases, a school administrator was unsuccessful in declaring invalid a state Peer Assistance and Review Program which she considered in conflict with her statutory duties to evaluate classroom teachers,[195] and an elementary teacher who had successfully defended himself against charges of sexual assault against students was unsuccessful in seeking indemnification for legal expenses from the school board.[196]

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states.

Some states permit teacher or administrative tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice-versa. Tenure transfer from one district in a state is controlled by state law.

Tenure Status

Tenure is normally acquired by being offered a contract for the year beyond the statutory number of probationary years. Any interference with this orderly process will affect tenure rights. Thus a teacher who had resigned during his third and last year of probationary teaching after the superintendent informed him he would not be recommended for continued employment did not acquire tenure even though the school district hired him for the next year as a substitute for a teacher on sabbatical.[197] A teacher reassigned during his third year of employment as a teacher aide did not qualify for tenure because he did not have three years as a teacher.[198] School boards in California have no power under the state's two-year probationary period to grant tenure after one year, even though a school board had promised a teacher by contract tenure after one year.[199] A teacher who had one year of teaching before accepting a coordinator position for three years was not entitled to teacher tenure because a coordinator did not fit one of the categories to which the tenure statute applied.[200]

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[193] Hannan v. Chesapeake Union Exempted Village School Dist. Bd. of Educ., 535 N.E.2d 392 (Ohio Ct. App. 1988).

[194] Jungina v. Stafford, 535 So. 2d 794 (La. Ct. App. 1988).

[195] Carnahan v. McWalters, 536 N.Y.S.2d 345 (App. Div. 1988).

[196] Monti v. Warwick School Comm., 554 A.2d 638 (R.I. 1989).

Tenure usually depends upon the offer of a contract and thus tenure is not acquired simply because a staff member recommended a third year probationary teacher for tenure.[201] However, collective bargaining contracts may play a part in the tenure process. In Ohio, a teacher had a clear legal right to tenure under a union contract which provided that teachers were eligible for a continuing contract if they had been so recommended by their principal.[202] In another Ohio case a teacher could not be deprived of tenure simply because the teacher had failed to make application as required under the collective bargaining agreement.[203]

Tenure status can arise in a myriad of fact situations. A tenured director of elementary education who was continued as an assistant superintendent and school principal after his director position was eliminated lost his tenure because neither of the two latter positions had tenure status.[204] Full-time tenured school teachers who were part-time school bus drivers were employees-at-will as to their bus driving and could be terminated without complying with the bus operator tenure law.[205] A tenured teacher who took a one year leave of absence which the school board by resolution stated was not mutually agreeable to it lost her tenure status and therefore did not have to be reemployed.[206] A state statute providing for transfer of rights, benefits, and tenure in transfer of special education personnel from one district to another placed these subjects beyond the district's duty to engage in collective bargaining.[207]

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[197] Williams v. Lafayette Parish School Bd., 533 So. 2d 1359 (La. Ct. App. 1988).

[198] Malone v. Shelby County Bd. of Educ., 773 S.W.2d 256 (Tenn. Ct. App. 1989).

[199] Fleice v. Chualar Union Elementary School Dist., 254 Cal. Rptr. 54 (Ct. App. 1988).

[200] Berry v. Pike County Bd. of Educ., 545 So. 2d 43 (Ala. Civ. App. 1987).

[201] Jeter v. Board of Educ. of School Dist. of Fremont, County of Dodge, 435 N.W.2d 170 (Neb. 1989).

[202] State v. Board of Educ. for Cleveland Heights-Univ. Heights City School Dist., 532 N.E.2d 1289 (Ohio 1988).

[203] State v. Milton-Union Exempted Village Bd. of Educ., 531 N.E.2d 1297 (Ohio 1988).

[204] Shaffer v. School Bd. of Martin County, 543 So. 2d 335 (Fla. Dist. Ct. App. 1989).

[205] Thorne v. Monroe City School Bd., 542 So. 2d 490 (La. 1989).

[206] Fisher v. Board of Educ. of W. Wash. County Community Unit Dist. No. 10, 537 N.E.2d 354 (Ill. App. Ct. 1989).

Tenure by Default or Acquiescence

A teacher may seek to secure tenure by taking advantage of a school district's error in oversight. However, a probationary teacher who had not received notice of nonrenewal by March 15 was unsuccessful in gaining tenure even though state statute provided that a teacher in his second probationary year who had not received a nonrenewal notice by that date became a permanent employee. The reason was that the teacher had received on June 10 notice of dismissal for cause, while a final dismissal decision was reached on June 29; in California a probationary teacher cannot acquire tenure when dismissal for cause proceedings are pending.[208]

CERTIFICATION

Certification can refer to rules or regulations, the actual certificate as indicia of one's professional status, and/or the process by which one secures such a certificate. Certain legal implications may flow from possession of a professional certificate. In an interesting divorce case, a wife's teaching certificate conferred prior to the parties' marriage, was not marital property, but the wife's master's degree, reflecting successful completion of a course of study undertaken during marriage, was marital property subject to equitable distribution.[209]

Certification Standards

Professional certificates are usually granted as the result of examination and/or completion of academic requirements. Failure of the examination or failure to maintain one's professional qualifications may adversely affect certification status. Two cases involved teacher certification and unemployment compensation. Two teachers discharged for failure to pass the Teacher Certification Test under the state's Quality Basic Education Act were nonetheless eligible for unemployment compensation benefits because their failure did not constitute deliberate conscious fault.[210] A teacher who held a teaching certificate from another state and who took, and failed three times, the Florida Teacher's Examination during each year of the three-year Florida temporary certificate was entitled, upon termination at the end of three years, to unemployment compensation because he had made a good faith effort to obtain a Florida teaching certificate and to deny "benefits to one who has made a good faith effort to comply with employment requirements would contravene public policy."[211] In a simple employment case, a temporary bilingual teacher who had taught for one year under a statutory waiver from the bilingual certification requirement did not have to be reemployed as a probationary teacher when she had failed to meet the waiver requirements and teachers with bilingual credentials were available.[212]

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[207] 207. Dearborn Fed'n of Teachers Local 681 v. Dearborn Bd. of Educ., 431 N.W.2d 253 (Mich. Ct. App. 1988).

[208] 208. Zhigulina v. Los Angeles City Bd. of Educ., 254 Cal. Rptr. 728 (Ct. App. 1989).

[209] 209. McGowan v. McGowan, 535 N.Y.S.2d 990 (App. Div. 1988).

School employees who permit their professional certificates to expire may find certain rights adversely affected. A tenured teacher whose teacher's certificate had expired and who received a termination notice shortly thereafter was not entitled to a hearing under the Teacher Tenure Act because the Act defines a "teacher" as one who is "regularly certified"; when the teacher's certification expired she ceased to be a "teacher" within the Tenure Act.[213] A school nurse whose five-year health services credential had expired could be immediately suspended without pay and was not entitled to backpay between the date of suspension and the date of obtaining a new credential. The nurse was not subject to statutory provisions pertaining to grounds and procedural rights for suspension of permanent employees because those provisions applied only to certificated employees and the nurse lost statutory protection when her credential expired.[214]

Decertification, Revocation, or Suspension

Certification agencies have broad, although not unlimited, discretion in penalizing persons holding certificates. A teacher holding a permanent teaching certificate could have his certificate revoked after pleading guilty to one count of mail fraud because, under state law, mail fraud was a crime involving moral turpitude.[215] A school bus driver whose driver's license had been suspended for one year after being found guilty of operating a motor vehicle while intoxicated could have her school bus driver's certificate revoked by the superintendent for business affairs, even though the driver was not notified of revocation or given a hearing, because no one under state law could drive a bus without possessing a driver's license.[216] State laws which required cancellation of, or refusal of renewal of, school bus licenses for three school bus drivers convicted of felonies had a rational purpose and did not violate equal protection of the law.[217] A teacher convicted of sexual battery was not prejudiced by the state education board's withdrawal of its resolution to revoke his teaching certificate after conviction but prior to sentencing and then reintroduction of the resolution after sentencing.[218]

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[210] Tanner v. Golden, 377 S.E.2d 875 (Ga. Ct. App. 1989).

[211] Gulf County School Bd. v. Washington, 544 So. 2d 288 (Fla. Dist. Ct. App. 1989).

[212] Royster v. Cushman, 261 Cal. Rptr. 458 (Ct. App. 1989).

[213] Frey v. Adams County School Dist. No. 14, 771 P.2d 27 (Colo. Ct. App. 1989).

[214] Stewart v. Acalanes Union High School Dist., 257 Cal. Rptr. 692 (Ct. App. 1989).

However, education authorities do not have unbridled discretion in altering professional certificates. A school bus driver whose bus license had been revoked because she was diabetic was entitled to have her license reinstated because her diabetic condition had been under control for over three years and her blood sugar level could be checked by a simple finger prick blood test without undue hardship to her employer.[219] Teachers granted provisional teaching certificates in October 1984 for five years had a legitimate expectation of employment for the five-year life of the certificate issued to them and the board of regent's subsequent regulations reducing provisional certificates to three years could not be applied retroactively to the teachers.[220]

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[215] Startzel v. Commonwealth Dept. of Educ., 562 A.2d 1005 (Pa. Commw. Ct. 1989).

[216] Patton v. Springfield Bd. of Educ., 531 N.E.2d 310 (Ohio 1988).

[217] Hill v. Gill, 703 F. Supp. 1034 (D.R.I. 1989).

[218] Yoder v. Ohio State Bd. of Educ., 531 N.E.2d 769 (Ohio Ct. App. 1988).

[219] Pennsylvania Dep't of Transp. v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).

[220] Reback v. Rhode Island Bd. of Regents for Elementary and Secondary Educ., 560 A.2d 357 (R.I. 1989).

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BARGAINING

Janet M. White

Introduction / 39
Constitutional Issues / 39
Recognition and Representation Issues / 42
  Unit Determination / 42
    Supervisory, Managerial, and Confidential Employees / 42
    School Status / 43
    Substitute, Part-time, and Nonprofessional Employees / 43
Rights and Obligations of Exclusive Bargaining Representatives / 44
  Union Rights / 44
Scope of Bargaining / 45
  Mandatory Topics of Bargaining / 45
  Prohibited Topics of Bargaining / 47
Grievability and Arbitrability / 48
  Presumption and Arbitrability / 48
  Who Determines / 50
Judicial Review / 51
  Propriety of Arbitral Awards and Agency Decisions / 51
    Salary Issues / 51
    Supplemental Duties / 51
    School Calendar / 51
    Medical Leave / 52
    Reprimand / 52
    Dismissal, Nonrenewal, Reduction-in-force, Layoff, and Demotion / 52
    Agency Review / 56
Strikes and Sanctions / 57
Conclusion / 58

INTRODUCTION

In 1989 there was a substantial amount of collective bargaining litigation. Although there was one Supreme Court case, the cases taken collectively did not establish any significant new trends or patterns. Nevertheless, the cases were of interest and presented some unusual factual issues. Cases involving K-12 are presented in this chapter; cases involving higher education are reviewed in Chapter 8.

CONSTITUTIONAL ISSUES

The topic of fair share fees continued to be an issue in 1989 litigation. One Supreme Court case regarding bargaining issues was decided during the year.[1] In this case, which originated in Texas, the teachers' union challenged a school board policy which prohibited communications concerning employee organizations by teachers or with teachers during the school day. The union contended that the policy violated the teacher's first and fourteenth amendment rights. The appeals court held that the district's actions in limiting teacher communication were unconstitutional. The union filed an instant application for an award of attorney's fees under section 1988. The Fifth Circuit Court held that the union was not the prevailing party and was not eligible for the payment of fees. The union appealed to the Supreme Court. The Court reversed on the basis that the union was the prevailing party since it had materially altered the school district's policy limiting the right of teachers to communicate with each other concerning employee organization and union activities.

Another appeal in *Chicago Teachers Union v. Hudson*[2] was heard in district court. The original 1986 Supreme Court case dealt with the rebate of funds collected from nonunion members which were not used for bargaining activities of the union.[3] In 1989 the Chicago union moved for final judgment and release of funds collected from nonunion workers and deposited with the clerk of the court. The motion was filed on the grounds that the current fair share notice adequately protected constitutional rights of the nonmembers. The district court held that the plaintiffs were not entitled to entry of final judgment since the court had not yet assessed damages.

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[1] Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).

[2] Hudson v. Chicago Teachers Union, Local No. 1, 708 F. Supp. 961 (N.D. Ill. 1989).

[3] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

A case from the Seventh Circuit also involved nonunion teachers challenging a procedural scheme to collect fair share fees from nonunion employees.[4] The union had filed suit in state court to obtain payment from nonunion employees of those fees determined due by the arbitrator as specified in the collective bargaining agreement. The employees moved for a preliminary injunction to intermit state court proceedings. Both the trial and appellate courts held that the nonunion teachers failed to carry the burden of establishing likelihood of success on the merits and that the collection scheme was constitutionally flawed.

An Ohio case was heard in the Sixth Circuit Court and involved an examination of the financial disclosure requirements expected under *Hudson*.[5] The nonunion teachers held that the state association had not met its obligation to provide financial data regarding the use of fair share fees charged to nonmembers. The court disagreed citing the financial provisions of *Hudson* which stated that absolute precision in the calculation of the fair share fee cannot be expected or required and that unions need not provide an exhaustive and detailed list of all their expenditures.[6]

In the final district court case, the provision of adequate explanation of agency fees as outlined in *Hudson*[7] was at issue.[8] The court found that the information provided by the union to the nonmembers regarding the use of fees was adequate since it was possible from the contested information to derive a simple bottom line percentage of total chargeable and nonchargeable expenses.

A Michigan case which originated nearly ten years ago was reviewed by the district court in 1989.[9] The case involved an injunction granted to prohibit a teacher's union from collecting future service fees from nonunion members until the union had adopted constitutional procedures for collecting the fee. The case hinged on two issues: first on the question of whether the union's calculation of the fee must be independently audited to reduce the risk that the fee would be excessive; and second on whether the court should have allowed discovery and examination of the financial data which the union planned to send to nonmembers. The court held that the auditor was to verify the accuracy of the figures, but not to determine the chargeability or nonchargeability of certain items and that it was not necessary to pass upon the actual source documents in order to decide on the validity of the service fee procedures.

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[4] Ping v. National Educ. Ass'n, 870 F.2d 1369 (7th Cir. 1989).

[5] 475 U.S. at 307.

[6] *Id* at 305.

[7] Gwirtz v. Ohio Educ. Ass'n, 887 F.2d 678 (6th Cir. 1989).

[8] Jibson v. Michigan Educ. Ass'n-NEA, 719 F. Supp. 603 (W.D. Mich. 1989).

[9] Lehnert v. Ferris Faculty Ass'n, 707 F. Supp. 1473 (W.D. Mich. 1988).

Another state case which cited *Hudson* as the relevant precedent originated in Indiana where the union held that since the payroll deduction for fair share fees in that state was "voluntary," the provisions of *Hudson* regarding rebate practices did not apply.[10] In examining the nature of the "voluntary" deduction, the court determined that although payroll deduction was not mandatory, payment of the fee was required. Therefore, the facts were judged to be similar to *Hudson* and the union was instructed to discontinue the contested rebate practice.

In another midwestern case the provisions of *Hudson* were at issue in Illinois where the duty of nonmembers to file objections to fair share fees was questioned.[11] In the case employees who were not members of the union contended that they were entitled to reductions to their fair share fees used for activities unrelated to collective bargaining regardless of whether they filed objections to fees as required by appropriate labor relations board rules. The court held that the employees must file objections to receive rebate of such fees.

The collection and use of service fees from nonmembers of unions was also challenged in the California courts.[12] In the case the employee challenged both the practice of withholding part of his paycheck as a service fee and the use of this fee by the union for purposes not directly related to negotiation, contract administration, and grievance handling. In an extensive examination of the rights of the union and the Public Employment Relations Board, the court determined that the Public Employment Relations Act prohibited the use of the service fee of objecting members for any activities other than representational obligations. In addition, the court upheld the right of the school district to collect service fees through involuntary payroll deductions.

In contrast, in the final state case involving fees, the South Carolina Education Association challenged state legislation prohibiting payroll deductions for membership dues to labor organizations on the grounds that the statute violated members rights under the first and fourteenth amendments.[13] The union contended that the legislation was motivated by the General Assembly's displeasure with the union's speech related activities. The court held that the legislation was facially neutral and not a constitutional violation.

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[10] Ake v. National Educ. Ass'n-South Bend, 531 N.E.2d 1178 (Ind. Ct. App. 1988).

[11] Shinn v. Illinois Educ. Labor Relations Bd., 539 N.E.2d 847 (Ill. App. Ct. 1989).

[12] Cumero v. Public Employment Relations Bd., 262 Cal. Rptr. 46 (Cal. 1989).

[13] South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989).

One district court case involved constitutional rights not related to fair share fees.[14] In the case a teacher charged that the school district's decision to transfer him to a less desirable position at another school was motivated by his earlier filing of a grievance regarding an unfavorable evaluation. The plaintiff filed suit under the first amendment right to associate freely and the right to petition the government for redress. The court held that filing the grievance was a proper exercise of his right to petition and that plaintiff's right to freedom of association was implicated as well.

RECOGNITION AND REPRESENTATION ISSUES

Unit Determination

Supervisory, Managerial, and Confidential Employees. Two 1989 cases evaluated the role of employees as related to management and supervision. The court of appeals in Indiana reversed and remanded a lower court finding that an athletic director, head football coach, and head basketball coach were supervisors and thereby excluded from the bargaining unit of school employees.[15] The court held that the coaches and athletic director were excluded only if they supervised full-time certificated employees. If the staff whom they supervised were not certificated, then these employees did not fulfill the definition of school employees as specified in the labor relations act, and the director and coaches in question would not be technically supervisory. The case was remanded for examination of the certification status of the supervised staff members.

A voluntary group of principals in Chicago sought to be recognized as a representative labor association contending that they were not supervisory employees since their supervisory roles were limited by district policy.[16] The court found that although the principals had little power or reason to directly perform most of the functions associated with supervisory employees, nevertheless they did hold enough responsibility to be classified as supervisors. Therefore, the court held that the principals were not educational employees and could not be recognized as a collective bargaining unit.

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[14] Stellmaker v. DePetrillo, 710 F. Supp. 891 (D. Conn. 1989).

[15] Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations Bd., 536 N.E.2d 563 (Ind. Ct. App. 1989).

[16] Chicago Principals Ass'n v. Educational Labor Relations Bd., 543 N.E.2d 166 (Ill. App. Ct. 1989).

School Status. There were also two 1989 cases which determined whether the schools involved were public or private entities. In the first case from the Seventh Circuit, a private school challenged the authority of the National Labor Relations Board (NLRB) to require the school to remedy unfair labor practices in which the school was found to have engaged.[17] The school did not contest the unfair practice, but held that funding from the government directly controlled the wages and fringe benefits paid to school employees. Under these circumstances the school contended that it could not enter into an effective collective bargaining agreement with any union. The court held that although the school did receive some state funds, the state did not exercise sufficient control of school policy to exempt the school from the authority of the NLRB.

In another school status case the teachers' association in a Maine community challenged the private independent status of an academy which provided services as the community high school under contract with the local school district.[18] The association held that due to the contractual arrangement, the academy was not a private employer, but rather a public employer, and therefore the association should be allowed to represent the academy's teachers since it represented other district employees. The court disagreed holding that in spite of the contractual provisions, the academy continued to function as a private school free from the control of the local district.

Substitute, Part-time, and Nonprofessional Employees. One case involved nonprofessional employees from Michigan and a union which sought an accretion election to determine the status of a detention study hall supervisor and an attendance officer.[19] In an earlier election, the study hall supervisor had been listed as an aide and as such had voted in the election. The union contested the classification of the position and sought to include both the supervisor and the attendance officer as professional employees. An examination of these employees' duties by the court resulted in the decision that they were not professional employees and the petition for an accretion election was denied.

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[17] National Labor Relations Bd. v. Potential School for Exceptional Children, Inc., 883 F.2d 560 (7th Cir. 1989).

[18] Lee Academy Educ. Ass'n v. Academy, 556 A.2d 218 (Me. 1989).

[19] Traverse City Educ. Ass'n v. Traverse City Pub. Schools, 443 N.W.2d 473 (Mich. Ct. App. 1989).

A second case originated in New York and involved clerical employees.[20] In the case a union sought to have a rival organization decertified and to be reorganized as the representative of the clerical employees. During the course of the process of decertification, the school district recognized the new union. The court hearing the union's appeal held that the issue was academic since the district's voluntary recognition had already provided the union what it sought and the rights of the parties would in no way be affected by the court's decision.

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

Union Rights

In Oregon a labor organization challenged the validity of the school district's meeting for approval of the collective bargaining agreement.[21] In the case a labor organization sought an election to establish itself as exclusive representative agent for the district's classified employees and had petitioned the education relations board to hold a representation election. The petition was subsequently filed with the school board. Meanwhile, the board discovered some budget and levy problems which it chose to consider at an emergency meeting. Later in the same day, the board continued the meeting and acted on the new collective bargaining agreement which had previously been presented. The union challenged the second emergency meeting on the premise that formalization of the agreement may have the effect of precluding a representation election since an existing contract bars a petition for election. The court held that although the early meeting could be classified as an emergency, there was no reason to act on the bargaining agreement in a second emergency session without providing appropriate notice of the meeting.

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[20] Mineola Union Free School Dist. Clerical/Secretarial Employees Ass'n v. Public Employment Relations Bd., 537 N.Y.S.2d 547 (App. Div. 1989).

[21] Oregon Ass'n of Classified Employees v. Salem-Keizer School Dist. 24J, 767 P.2d 1365 (Or. Ct. App. 1989).

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

The determination of which topics were mandatory and which were prohibited in collective bargaining negotiation continued to be at issue in several 1989 cases. The D.C. Circuit Court heard a case involving changes in working conditions of teachers at Department of Defense overseas schools.[22] In the case the Department had instituted new regulations which added a class period to the school day and mandated that teachers would give up planning periods and lunch periods as necessary to cover the classes of absent teachers. The union filed a grievance and the Department refused to bargain. The union then filed unfair labor practice charges holding that these new regulations had a significant effect on the working conditions of the teachers and were a mandatory subject of bargaining. The Federal Labor Relations Authority responded that the changes were an exercise of management rights and not bargainable. On appeal of this holding, the circuit court disagreed. The court conducted an extensive examination of the legislative history and intent of the Federal Labor Relations Act and determined that the proposed changes altered working conditions significantly enough to be a subject of bargaining under the Act's provisions.

A case heard in the District of Columbia Court of Appeals dealt with the school calendar as a mandatory topic of bargaining.[23] The board of education modified the school calendar to include provisions that teachers would start work one day earlier than usual and that Good Friday would be a regular school day. The end of the school year was shortened by two days, thus maintaining the original total number of working days. These alterations were made without negotiating with the union. The union challenged the changes and the court held that calendar decisions of this nature were subjects of employer discretion and not mandatory topics of bargaining under the union agreement.

Another case involving the school calendar was heard in Indiana courts.[24] In the case, the school board refused to bargain with teachers regarding calendar items which the board alleged were management perogative. On appeal from the union, the Indiana Education Employment Relations Board (IEERB) ordered the board to cease and desist from refusing to bargain. The district sought judicial review and the court set aside the IEERB decision. On appeal, the appeals court held that the IEERB order complied with Indiana law and reversed the lower court's decision.

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[22] Overseas Educ. Ass'n v. Federal Labor Relations Auth., 876 F.2d 960 (D.C. 1989).

[23] Public Employee Relations Bd. v. Washington Teachers' Union Local 6, 556 A.2d 206 (D.C. 1989).

[24] Indiana Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n, 546 N.E.2d 101 (Ind. Ct. App. 1989).

Classroom size was held to be a mandatory topic in a case from Illinois.[25] The court held that class size has a direct effect on the conditions of employment of teachers. Therefore, a balancing test between the interests of the employees and the interest of the district in maintaining unencumbered control over managerial policy was indicated. The court found that the balance was in favor of the teachers and held class size to be a mandatory topic of bargaining.

A grandfather clause in a collective bargaining agreement became the issue in an Indiana case.[26] The district had adopted a new program designed to improve classroom instruction and had assigned certain supervisors to evaluate the performance of classroom teachers in the new program. The union held that this supervision practice violated a provision of the collective bargaining agreement. The contested provision prohibited the changing of conditions of employment from those which were in place as local practice at the time of the agreement's adoption. Furthermore, the union held that the changes were a mandatory subject of bargaining under the agreement. The court agreed that the district had committed an unfair labor practice in instituting the evaluation program without bargaining for such a change.

Following a severe decline in the local economy a district in Pennsylvania negotiated an agreement with another district to send all students in grades 7-12 to the second district for education, resulting in the furlough of thirteen teachers in the originating district.[27] The teachers filed a grievance holding that such an alteration of policy should have been a topic of bargaining. The court held that the district had a duty to bargain with its teachers under these circumstances, and that failure to do so constituted an unfair labor practice.

In a New York case the district challenged a Public Employment Relations Board order regarding smoking in school buildings and school buses.[28] The court held that the district's policy prohibiting smoking in district buildings was a condition of employment and therefore a subject of collective bargaining. On the other hand, the prohibition against smoking in buses was not subject to mandatory negotiation since the state Commissioner of Education had issued a regulation banning smoking on buses and bargaining on the topic was thereby precluded by the same regulation.

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[25] Decatur Bd. of Educ. Dist. No. 61 v. Illinois Educ. Labor Relations Bd., 536 N.E.2d 743 (Ill. App. Ct. 1989).

[26] Board of School Trustees of Gary Community School Corp. v. Indiana Educ. Employment Relations Bd., 543 N.E.2d 662 (Ind. Ct. App. 1989).

[27] Midland Borough School Dist. v. Pennsylvania Labor Relations Bd., 560 A.2d 303 (Pa. Commw. Ct. 1989).

Prohibited Topics of Bargaining

Personal service contracts required of teachers who were employed by the Army to teach military dependents were challenged on the grounds that they were in conflict with the tenure provisions of the collective bargaining agreement.[29] The Army refused to negotiate and the union appealed to the Federal Labor Relations Authority (FLRA). The Authority determined that the union's proposal to eliminate the contracts was outside the Army's duty to bargain since it interfered with the Army's right to hire. On appeal the court reversed finding no substantive interference with the Army's hiring prerogatives and held that the union's proposal was negotiable.

In another case involving the Army's duty to bargain, the Sixth Circuit Court found that the Army was not required to bargain with teachers and their union over wages.[30] In making its decision the court relied on the legislative intent and history of the Federal Service Labor-Management Relations Act.

In a New York case a district imposed regulations mandating financial disclosure and background investigations of nontenured employees as a condition of their continued employment.[31] The union held that such disclosure and investigations should be mandatory topics of collective bargaining. On appeal of the arbitrator's decision, the court disagreed holding that the strong public interest in detecting and deterring corruption was a paramount consideration in the district's policy and that the district could hardly be required to collectively bargain over anticorruption measures with the employees whose honesty and integrity were at issue.

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[28] Rush-Henrietta Cent. School Dist. v. Newman, 542 N.Y.S.2d 440 (App. Div. 1989).

[29] Fort Bragg Ass'n of Educators NEA v. Federal Labor Relations Auth., 870 F.2d 698 (D.C. Cir. 1989).

[30] Fort Knox Dependent Schools v. Federal Labor Relations Auth., 875 F.2d 1179 (6th Cir. 1989).

[31] Board of Educ. City School Dist. v. State Pub. Employment Relations Bd., 542 N.Y.S.2d 53 (App. Div. 1989).

GRIEVABILITY AND ARBITRABILITY

Presumption and Arbitrability

Consideration of arbitrability of a grievance was at issue in an Idaho case concerning the suspension of a teacher during a reduction-in-force.[32] The union filed a grievance which the district refused to negotiate holding that such action was in conflict with its duties and responsibilities to hire and fire. The court disagreed and remanded the case for arbitration.

In New York a decision by a school district to deny tenure to four teachers based on declining enrollment was viewed by the union as a violation of the provision governing layoffs thereby making it an arbitrable dispute.[33] The court determined that it was never the intention of the administration to reduce the staff, but rather the intent was to avoid long term financial commitments based on the projected enrollment decline. Therefore the issue was within administrative control and was not arbitrable.

In a case from Massachusetts, a custodian sought overtime pay for late night shift hours worked after midnight on Friday nights.[34] The custodian filed his claim with the local union, but the union found that the claim was not meritorious and refused to represent the custodian. Although the collective bargaining agreement provided that he could be represented at all stages of the grievance procedure by a person of his own choosing, and that he could pursue his grievance without union support, nevertheless, he sought judicial relief. The court held that it was inappropriate for the courts to assert their jurisdiction before the case had been heard by the local labor commission. The case was dismissed.

Two teachers in Oklahoma sought a writ forcing the local district to arbitration on the discharge of one probationary teacher and the deletion of coaching duties for the other.[35] The court held that state statute prevailed over the collective bargaining agreement and therefore the questions of dismissal and fixing duties of teachers were the responsibility of the local school board and not subject to arbitration.

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[32] Bear Lake Educ. Ass'n v. Board of Trustees of Bear Lake School Dist. No. 33, 776 P.2d 452 (Idaho 1989).

[33] Department of Educ., Diocese of Rockville Centre v. Lay Faculty Ass'n Local 1261, 545 N.Y.S.2d 730 (App. Div. 1989).

[34] Johnston v. School Comm. of Watertown, 533 N.E.2d 1310 (Mass. 1989).

[35] Mindemann v. Independent School Dist. No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989).

A case in Washington dealt with sick leave provisions of an expired contract.[36] The teachers in question had attempted to cash in sick leave upon retirement under the terms of a prior collective bargaining agreement. The district refused to submit the grievance to arbitration on the grounds that the new agreement was silent on the subject of sick leave "cash in" upon retirement. The court held that notwithstanding the expiration of the agreement, the grievance could be processed through the grievance procedure to resolution.

In a New Hampshire case a second year teacher was nonrenewed for her third year on the grounds that she "was not a good fit" for the position.[37] She filed a grievance and the district refused to proceed to arbitration. The union filed an unfair labor practice action on the grounds that the discharge could be construed as disciplinary and would therefore be covered under the terms of the collective bargaining agreement. The court disagreed holding that the nonrenewal was management prerogative and not covered by the collective bargaining agreement.

A Pennsylvania teacher was dismissed, received a hearing, and, although he did not appeal the decision, proceeded directly to arbitration.[38] The district held that the grievance was not arbitrable under the terms of the collective bargaining agreement. The trial court found that although the collective bargaining agreement provided for arbitration in cases involving nontenured employees, it did not provide the same remedy for tenured teachers. The union challenged the trial court's jurisdiction holding that the arbitrator should properly make such a determination. The commonwealth court held that the trial court had jurisdiction since the arbitration proceeding had not begun.

The evaluation process to be used by the district was at issue in a case originating in New York.[39] The union held that the evaluation process was subject to arbitration and the district contended that it was an important part of public policy and thereby exempted from bargaining. The court held that the district must bargain about the evaluation process.

A dispute between the union and a private Japanese school based in New York involved a request for an injunction to prevent the school administration from proceeding with changes in current

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36. Naches Valley School Dist. No. JT3 v. Cruzen, 775 P.2d 960 (Wash. Ct. App. 1989).

37. *In re* Westmoreland School Bd., 564 A.2d 419 (N.H. 1989).

38. Middle Bucks Area Vocational Technical School Educ. Ass'n v. Executive Council, 552 A.2d 763 (Pa. Commw. Ct. 1989).

39. Board of Educ. of Enlarged City School Dist. of City of Newburgh v. Newburgh Teachers' Ass'n, 537 N.Y.S.2d 250 (App. Div. 1989).

practice prior to an arbitrator's decision regarding the practice.[40] The dispute resulted from a plan proposed by the Institute to change the format of Shunin-kai meetings which had been held between teachers and administration since 1963. The meetings were intended to promote communication between the two groups, and the union held that they had been successful in this effort. The meetings were held monthly and co-chaired by the principal of the school and the president of the union, or their designates. The administration wanted to change the meeting from a single meeting in one location to three concurrent meetings held in three separate locations. The union objected on the grounds that the top representatives (chairman and principal) would not hear the comments at each meeting first hand and that communication would suffer as a result. When the union filed a grievance, the administration agreed to postpone the proposed changes pending arbitration, but when the arbitrator set a date several months hence for rendering his decision, the administration set the concurrent meeting dates for the next three monthly meetings. The union sought an injunction to prevent the split meetings. The court granted the injunction, holding that the union membership could be irreparably harmed by the alteration of meeting format prior to the arbitrator's decision.

Who Determines

The question of who determines the arbitrability of a grievance arose from a challenge by a nontenured teacher who had been dismissed by the school district.[41] The union filed a grievance, the school district denied the grievance, and the union filed unfair labor practice charges. A series of appeals and actions ensued which resulted in a circuit court decision enjoining the union from proceeding with arbitration and the board from proceeding on the unfair labor practice hearing. The appeals court determined that under the Illinois Educational Labor Relations Act the circuit court had no jurisdiction to vacate, enforce, or enjoin an arbitration in the context of public educational labor disputes.

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[40] Teachers Ass'n of Japanese Educ. Inst. of N.Y., Inc. v. Japanese Educ. Inst. of N.Y., 724 F. Supp. 188 (S.D.N.Y. 1989).

[41] Board of Educ. of Warren Township High School Dist. 121 v. Warren Township High School Fed'n of Teachers, Local 504, 538 N.E.2d 524 (Ill. 1989).

JUDICIAL REVIEW

Propriety of Arbitral Awards and Agency Decisions

Salary Issues. In a New York case a teacher filed a grievance over a salary issue and pursued his grievance according to the terms of the collective bargaining agreement.[42] Ultimately he received an adverse decision. He then filed suit against his employer, the Board of Cooperative Educational Services. The court dismissed his claim holding that he could not sue his employer directly, but was required to proceed through the union in accordance with the terms of the contract.

Supplemental Duties. In a Kansas case a district policy mandating the supervision of noon recess and lunchroom duties was challenged as a violation of fair labor practice.[43] In the case a teacher objected to being assigned supervision of noon lunchroom or being assigned hallway duty at noon recess. The court held that the noon recess duty was related to the education process and therefore controlled by the primary contract, and that the contract allowed the school district to assign noon playground and hallway duty.

A South Dakota case also involved noontime responsibilities.[44] In this case teachers were assigned to hallway supervision during each of the seven periods of the school day and received no additional compensation for these assignments. Teachers assigned to lunchroom duty were compensated as provided in the collective bargaining agreement. The noncompensated teachers filed a grievance seeking compensation, but the court held that the collective bargaining agreement prevailed and specified compensation only for the lunchroom supervisors.

School Calendar. In Indiana teachers who were required to make up days at the end of the school year without compensation challenged the school board's right to require them to make up rescheduled days.[45] The district's policy called for a flexible calendar which provided that if more than five days were lost in each semester the additional days could be made up at several possible times during the week following the spring semester. The teachers challenged based on the state school closing statute which was amended after the disputed days were added to the calendar. The court conducted an extensive examination of the legislative intent of the statute and concluded that the school board did not breach the collective bargaining agreement when it required the teachers to teach on the rescheduled days without additional compensation.

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[42] Sargent v. Board of Coop. Educ. Servs., 540 N.Y.S.2d 54 (App. Div. 1989).

[43] NEA-Goodland v. Board of Educ. U.S.D. No. 352, Sherman County, 775 P.2d 675 (Kan. Ct. App. 1989).

[44] Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 442 N.W.2d 926 (S.D. 1989).

[45] Halley v. Board of School Trustees of Blackford County School Corp., 531 N.E.2d 1182 (Ind. Ct. App. 1988).

Medical Leave. In a California case a tenured teacher suffered from stress related mental illness presumably caused by difficulties with her principal.[46] She subsequently took sixteen months voluntary sick leave. After exhausting benefits through workers' compensation and state disability allowance, the teacher sought a return to work. Several psychiatrists issued opinions about her readiness to deal with job related stress, but the district psychiatrist held that she was not fit for work and the district refused to reinstate her. Furthermore, the district held that since she was not formally suspended, terminated, or placed on mandatory sick leave, she was not entitled to a reemployment hearing under the terms of the collective bargaining agreement. The court held that although the employee bears the initial burden of presenting medical evidence of recovery, the collective bargaining agreement which identified the district psychiatrist as the final determiner of fitness for work circumvented the employee's opportunity to present her case successfully. Furthermore, the action of the psychiatrist placed the burden of proof of the unfitness on the district and mandated a competency hearing. The court held that the provision of the collective bargaining agreement was in conflict with the requirements of the Education Code. The teacher was granted her appeal for a hearing and granted back pay from the date when she presented fitness for work statements from her doctors.

Reprimand. Refusal to attend a meeting with the assistant superintendent without union representation resulted in reprimand for a Michigan counselor.[47] The court held that the counselor had reason to believe that the proposed meeting might result in disciplinary action and he was therefore justified in his decision not to attend the meeting without representation.

Dismissal, Nonrenewal, Reduction-in-force, Layoff, and Demotion. A large number of cases resulted from challenges to decisions which terminated employment. A choir director in Montana was nonrenewed after three years of service under one year contracts and filed a grievance for violation of due process and breach of contract.[48] The court held that the director failed to follow the administrative procedure outlined in the contract and therefore gave up his right to final determination.

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[46] Raven v. Oakland Unified School Dist., 262 Cal. Rptr. 354 (Ct. App. 1989).

[47] Wayne-Westland Educ. Ass'n v. Wayne-Westland Community Schools, 439 N.W.2d 372 (Mich. Ct. App. 1989).

[48] Thompson v. Board of Trustees of School Dist. No. 2, Yellowstone County, 774 P.2d 412 (Mont. 1989).

In another Montana case an employee brought action against the state superintendent for wrongful discharge holding that the Wrongful Discharge from Employment Act unconstitutionally limited her right to full legal redress.[49] The court disagreed finding that no guarantee of a fundamental right to a particular cause of action existed and therefore the plaintiff's rights had not been violated.

In an Illinois case a district refused to bargain over the impact of its decision to eliminate a maintenance foreman's position.[50] The employee relations board ordered reinstatement of the position and the district appealed after the expiration of the thirty-five days allowed for filing appeals. The district appealed to the courts, but the court dismissed the case for untimely appeal.

In another Illinois case, a sheet metal instructor at a vocational school who was certified only in that subject area, challenged his suspension following termination of the sheet metal program.[51] At a hearing pursuant to agency law, the teacher indicated that he was in the process of being certified in another vocational area, but waived his right to written adjudication and requested an immediate decision. His suspension was upheld. He appealed and the trial court upheld the suspension, but concurrently, the local agency filed a grievance which was brought to an arbitrator who sustained the grievance and ordered the district to consider realignment of its professional staff. The appeals court determined that the grievance was barred by the doctrine of election of remedies and affirmed.

Another case involving a vocational school teacher was heard by the Supreme Court of Pennsylvania.[52] In the case a mathematics teacher was furloughed due to declining enrollments and, although she was also certified in French, she was lowest in seniority in both departments. The union filed a grievance challenging her furlough and the arbitrator upheld the grievance finding that the district should have considered the teacher's seniority in relation to all teachers and should have reshuffled staff in any department to ultimately furlough the least senior employee among all departments. The court disagreed, citing the precedent that in no rational way could the decision of the arbitrator be derived from the language and context of the collective bargaining agreement.[53] The court discounted the arbitrator's reliance on a state statute holding that he had chosen to ignore a clear legislative mandate that collectively bargained for methods of reducing the number of school personnel must supersede the methods delineated in the education code.

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[49] Johnson v. State, 776 P.2d 1221 (Mont. 1989).

[50] Board of Educ. Jacksonville School Dist. No. 117 v. Illinois Educ. Labor Relations Bd., 539 N.E.2d 882 (Ill. App. Ct. 1989).

[51] Altoona Area Vocational-Technical Educ. Ass'n v. Altoona Area Vocational-Technical School, 559 A.2d 974 (Pa. Commw. Ct. 1989).

[52] Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 553 A.2d 913 (Pa. 1989).

Another Pennsylvania case involved a school bus driver who was discharged for job abandonment and insubordination for his failure to provide appropriate medical excuses for absences from work.[54] He filed a grievance, following the procedure set forth in the collective bargaining agreement. The union pursued the grievance to arbitration where the arbitrator determined that the discharge should be converted to a disciplinary suspension without pay or contractual benefits. The bus driver then petitioned the court to vacate and/or modify the arbitrator's decision to provide back pay. The court held that the driver did not have standing to file the appeal since he was not a party to the arbitration. If any such petition was to be filed, it should properly be filed by the union. The driver also alleged that the union had breached its duty of representation by not filing the petition for back pay, but the court held that the driver would have to file an independent action against the union for breach of duty.

A temporary professional employee in Pennsylvania challenged the school district's alteration of his seniority which had been granted during periods of suspension.[55] The teacher had been assured that he would continue to accumulate seniority in a letter from the school board chairman, but no such provision appeared in the minutes of the relevant school board meetings. In the resulting grievance proceeding the district held that state statute did not mandate the continuance of seniority for temporary professional employees. The arbitrator disagreed, granted the seniority, and, on appeal, the court affirmed his decision.

In New York a conflict between the terms of a collective bargaining agreement and the provisions of state statute provided the basis for a case involving a teacher in a health tenure area.[56] The district decided to abolish two of five positions in the area and, in determining who should be dismissed, relied on the provision of the collective bargaining agreement related to continuance of tenure in cases of voluntary transfer. The two dismissed teachers had seniority in the health area, but less total seniority than two teachers who were retained. The court held that the state statute provision that tenure should be considered in such a case only if in the relevant area prevailed over the terms of the collective bargaining agreement.

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[53] 53. Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 414 A.2d 118, 120 (Pa. 1980).

[54] 54. Krenzelak v. Canon-McMillan School Dist., 566 A.2d 347 (Pa. Commw. Ct. 1989).

[55] 55. Upper Merion Area School Dist. v. Upper Merion Area Educ. Ass'n, 555 A.2d 292 (Pa. Commw. Ct. 1989).

[56] 56. Szumigala v. Hicksville Union Free School Dist. Bd. of Educ., 539 N.Y.S.2d 83 (App. Div. 1989).

In contrast, in an Ohio case the court held that the collective bargaining agreement prevailed over state statute by interpretation of another statute.[57] The case involved a seniority dispute in which the district's determination of who should receive a particular assignment was challenged by the union. The district's defense relied on state statute which gave the executive officer of the board the right to direct and assign teachers. The court, however, relied on a state statute which prohibited unreasonable or absurd consequences. Since the transfer of teachers was a proper subject of collective bargaining, and since a bargaining agreement was in place at the time of the district's action, it prevailed over the statute regarding the assignment of the teacher.

An Idaho case began with a reduction in force which resulted in a regular teacher being placed in a special pool from which the district was bound by the collective bargaining agreement to select substitutes and teachers to fill open positions.[58] At the relevant time, the teacher was the lone staff member in the pool. A tenured teacher became ill and the pool teacher was called in as a substitute for about half of the days missed by the ill teacher. She was then called to substitute for the ill teacher for one entire year. In the third year, the ill teacher declined her contract and the district offered the contract to the pool teacher. She filed a grievance against the district holding that she should have taught all of the available days in the first year of the teacher's illness and that she should have been offered a regular contract for the second year. The court held that the district was negligent in its effort to contact her as the substitute for the days in the first year, but that the district could not have offered her the contract for the position in the second year since the position was not technically open.

A school bus driver in Pennsylvania was involved in an accident in which he was found negligent and ultimately discharged.[59] Although he did not pursue his right for a due process hearing, the bus driver filed a grievance challenging his discharge. The collective bargaining agreement included a provision that in cases of discharge, arbitration would not be pursued where due process hearing procedures were available. The arbitrator held that the district should reinstate the driver with back pay, benefits, and seniority, but also provide a one week suspension; however, the court reversed holding that under the terms of the collective bargaining agreement, the parties did not intend to submit the dismissal to arbitration and therefore the arbitrator lacked authority to address the issue.

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[57] Alexander Local School Dist. Bd. of Educ. v. Alexander Local Educ. Ass'n, 534 N.E.2d 107 (Ohio Ct. App. 1987).

[58] Flemmer v. Tammany Elementary School Dist. No. 343, 774 P.2d 914 (Idaho Ct. App. 1989).

[59] Garnet Valley Serv. Personnel Ass'n v. Garnet Valley School Dist., 563 A.2d 207 (Pa. Commw. Ct. 1989).

A tenured teacher in Michigan was laid off due to a reduction-in-force and used the period of her layoff to obtain certification in learning disabilities.[60] The district hired probationary teachers with less seniority to fill learning disabilities teaching assignments subsequent to her presentation of her new credentials. The court found that the district had violated the provisions of the collective bargaining agreement in not assigning her to the open positions.

Agency Review. In an Illinois case which originated five years earlier, the appellate court was asked to decide the propriety of the Illinois Labor Relations Board (ILRB) reconsideration and alteration of one of its own decisions.[61] The case had involved a dispute between the union and school district regarding the district's plan to reorganize part of an elementary school and a junior high into a middle school. The plan included expansion of the number of classes taught and alteration of the length of teaching period. On appeal to the ILRB, the hearing officer found that the district did not unlawfully refuse to bargain with the union over the impact of the decision to reorganize, since the reorganization was a matter of inherent managerial policy. The union filed an exception and, on rehearing, the ILRB held that the district had a duty to bargain over the impact of the decision to reorganize, specifically as the decision affected conditions of employment. The district appealed and the appellate court held that the ILRB had no authority to reconsider its order since an administrative decision is a final order if it terminates the proceedings before the agency and fixes the rights and liabilities of the parties involved.

In a similar case, the Ohio Supreme Court affirmed a lower court decision that when an appeal is filed in the courts, the administrative agency loses jurisdiction over the decision.[62] In the case the union filed unfair labor practice charges with the State Employment Relations Board (SERB) and the Board deferred the matter to arbitration. The union appealed, was denied, and took the matter to court contending that the SERB decision was a final order. Later the union attempted to have the SERB decision vacated, but SERB denied the action citing lack of jurisdiction. On appeal the Ohio Supreme Court held that when a notice of appeal from a decision of an administrative agency has been filed, the agency is divested of jurisdiction to reconsider, vacate, or modify the decision unless there is statutory language to the contrary.

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[60] Hodgeson v. Board of Educ. of Buena Vista School Dist., 438 N.W.2d 295 (Mich. Ct. App. 1989).

[61] Board of Educ. v. Illinois Educ. Labor Relations Bd., 534 N.E.2d 1022 (Ill. App. Ct. 1989).

STRIKES AND SANCTIONS

In an appeal of a federal labor relations authority case, the Fourth Circuit considered a claim of the Department of Defense Office of Dependent Schools challenging the authority decision regarding negotiability and arbitration.[63] The court held that the decision of an arbitrator who was delegated authority by the Federal Services Impasse Panel was no different than the panel itself and thus was subject to agency head review. Furthermore, only when parties agreed to voluntary binding arbitration is the agency head unable to review and disapprove collective bargaining terms imposed by the arbitrator.

In a case from New Jersey a strike by teachers in 1984 resulted in payment to the school board of $70,000.[64] The amount of payment was challenged on appeal. The court found that the $10,000 per day payment was arbitrarily determined and not related to the losses incurred by the board. Therefore the case was reversed and remanded for further proceedings to determine actual cost.

In Pennsylvania a district and the teachers' union were unable to reach agreement on a new collective bargaining agreement prior to the end of the contract.[65] Consequently, the teachers went on strike for one week in September and struck again in January. The district sought an injunction ordering the teachers back to work pending collective bargaining agreement negotiations. At a meeting at the courthouse, the disputing parties reached a tentative agreement which was approved by a majority of the board members and appropriate union representatives. Subsequently, an open meeting was held to officially ratify the agreement. At the meeting two members of the board who had originally voted for the agreement voted against it and it was not passed. The union filed an unfair labor practice against the board. It's claim was supported by the Pennsylvania Labor Relations Board and both the trial and appeals courts.

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[62] Lorain Educ. Ass'n v. Lorain City School Dist. Bd. of Educ., 544 N.E.2d 687 (Ohio 1989).

[63] Department of Defense v. Federal Labor Relations Auth., 879 F.2d 1220 (4th Cir. 1989).

[64] East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 563 A.2d 55 (N.J. Super. Ct. App. Div. 1989).

[65] St. Clair Area School Dist. v. St. Clair Area Educ. Ass'n, 552 A.2d 1133 (Pa. Commw. Ct. 1989).

CONCLUSION

Although the volume of cases was still large, the most significant change appearing in the collective bargaining area in 1989 was the drop in number of cases compared to recent years. The largest number of cases challenged the specifics of fair share fee level establishment and the processes in place for collection of fees. There were also a significant number of cases surrounding issues of layoff, termination, and suspension. No other new trends appeared.

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PUPILS

Henry S. Lufler, Jr.

Introduction / 59
Public School Assignment, Tuition, and Transportation / 60
    Tuition and Assignment / 60
    Transportation / 62
    Home Instruction / 63
    Compulsory Attendance / 66
Private and Parochial Schools / 67
Substantive Rights of Students / 69
    Search and Seizure / 69
    First Amendment Religious Rights / 73
    First Amendment Freedom of Expression / 77
Sanctions for Student Misconduct / 80
    Suspensions and Expulsions / 82
    Corporal Punishment / 84
Bilingual-Bicultural Programs / 86
Desegregation / 87
    Cross-district Remedies / 87
    Desegregation Plan Oversight / 90
    State Court Cases / 93

INTRODUCTION

Cases involving searches of public school pupils in order to obtain evidence of drug sales or use, and litigation challenging the punishments meted out to students found with drugs, continued to occupy the attention of courts in 1989. Also continuing a trend seen in previous years, religion-based challenges to state regulation of both home instruction and small private schools generated a high volume of cases. Finally, in the desegregation area, conflicting decisions again were issued by federal courts of appeal regarding the standards that lower courts should use in deciding if school districts had attained "unitary status."

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Tuition and assignment cases generally involve disputes between school districts regarding the liability for the cost of educating students whose residence is not easily determined. One case heard in 1989 involved students whose parents were homeless and another involved students who were institutionalized for alcohol or other drug abuse. Other plaintiffs sought to enroll their children in school without securing vaccinations and another filed a challenge to an age requirement for kindergarten enrollment.

The children of a New York homeless mother who temporarily resided in a motel were denied admission at the school they had been attending on the grounds that the motel was outside the district boundaries. The children's father lived in the district but was no longer able to care for them because his landlord would evict him if they remained. While the state of New York subsequently enacted rules to cover such situations, giving homeless parents a choice of picking the district in which they resided currently or the one they had lived in when they became homeless, the rule was not in effect in time to cover the case at hand. After missing five days of school, the children were readmitted to the school they had been attending, and, with the passage of the new state rule, the substantive portion of the case was moot.

The plaintiff, however, continued the suit, seeking damages and attorneys' fees. The claim was based on the fact that the district had not followed its own rules requiring written notice following a determination of nonresidence.[1] Based on the failure to give notice, fees and damages for five days of missed school were sought. The court concluded that the actual harm for missing five days of instruction was equivalent to that which a student would suffer if the absence were due to the common cold. Nominal damages, however, are possible for a constitutional violation with a minimal impact and, since the notice had not been provided, the court awarded damages of one dollar, as well as the fees.

An Illinois court considered the question of who should pay the educational expenses for students living in a private residential center for the treatment of alcohol and other drug abuse.[2] The students

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1. Harrison v. Sobol, 705 F. Supp. 870 (S.D.N.Y. 1988).
2. Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989).

were enrolled in a regular public school program, receiving additional treatment and therapy at the institution outside the regular school day. Prior to 1987, the state had paid the education costs for such students. The state announced in the summer of 1987 that it would cease to provide the support, and the local district began to charge tuition for the institutionalized students whose homes were outside its boundaries. Several parents then filed suit against the state, asking that the state payments continue.

The case centered on the interpretation of the Illinois School Code that requires tuition payments by the state for children living in institutions who are "orphans, dependent, abandoned, or maladjusted." The plaintiffs argued that drug-dependent children were "maladjusted" under the terms of the code, and the state disagreed. The parents prevailed, with the court concluding that any "popularly understood interpretation" of the code provision would lead to the conclusion that chemically addicted children were "maladjusted." The tuition charges collected by the local district were ordered to be returned. The plaintiffs' attempt to secure attorneys' fees under section 504 of title 5 of the Rehabilitation Act of 1973[3] was rejected because the case hinged on the students' residence rather than any claim of disability or handicap.

A five-dollar-per-pupil fee assessed every six weeks by an Ohio school district to provide funds for the purchase of administrative supplies was challenged by a parents' group. The group sought a writ from the Supreme Court of Ohio to halt the charging of the fee, which was to be the second of two fees levied by the district. The district already charged parents a "classroom supply fee," a practice permitted by the state education code. While the district characterized its second fee as similar to the first, the Ohio high court concluded that the copier materials and record supply sheets that the new fees had purchased were administrative in nature.[4] Charging for administrative materials would violate the state free public education statute. While the state high court was precluded from issuing an injunction to stop the fee, it did issue a peremptory writ having the same effect. The writ required the district not to withhold student grades and credits if the fee was not paid.

What started as a modest case involving a tuition charge levied against a family whose new home was not completed on time ended with a finding that Maryland's nonresident tuition statute was unconstitutional. A local board policy permitted the waiving of the nonresident tuition charge for families that were in the process of moving into the district. When the family's house was not completed by the time that the waiver specified, a tuition charge was assessed and the parents filed suit.

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[3] 29 U.S.C. § 794.

[4] Association for the Defense of the Wash. Local School Dist. v. Kiger, 537 N.E.2d 1292 (Ohio 1989).

A state court sustained the tuition levy, and the parents appealed to the Maryland Court of Appeals. In assessing the case, the Maryland high court concluded that the case raised "issues of statewide significance," after it found that widely differing tuition policies were followed in different counties.[5] Some school districts routinely charged nonresident tuition while others did not. In addition, only some of them permitted waivers of nonresident tuition. Finding that state policies were unclear and that the state board had authority to promulgate rules in this area, the court gave the Maryland State Board of Education time to consider the new, uniform regulations. Pending the outcome of that review, the case at hand was remanded to the lower court.

The parents of an Illinois five-year-old sought to have their child admitted to kindergarten, even though his birthday fell five days after the statutory admission date. The child's father, an attorney, raised a variety of arguments regarding the powers of a school district to make an exception to the deadline. None of the plaintiff's interpretations of the state code was accepted by the court, which held that the district could admit the child if he were tested and found to be ready for school, but that the district was not obligated to conduct the test, as was asserted by the parents.[6]

Transportation

Cases involving transportation of children to private and parochial schools are discussed in a later section in this chapter. In this section, cases that focus solely on public school transportation issues are presented. In the single 1989 case falling in this category, a Connecticut parent sought to have a school bus drive to her home to pick up a child, rather than using an established stop. The plaintiff's argument centered on the fact that no other children were involved in the issue because the child was the only student waiting for the bus at that location. A lower court ruled against the parent and an appeals court sustained the decision, concluding that the parent was not sufficiently "aggrieved" by the school district's decision, the burden that had to be met in order to prevail under Connecticut law.[7]

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[5] Clinton v. Board of Educ. of Howard County, 556 A.2d 273 (Md. 1989).

[6] Morrison v. Chicago Bd. of Educ., 544 N.E.2d 1099 (Ill. App. Ct. 1989).

Home Instruction

State statutes regulating home instruction vary widely, ranging from a virtual ban on the practice in states that require all home instruction to be provided by a certified teacher to very permissive systems that require little more than the registration of students being educated at home. A variety of constitutional challenges are advanced each year in home instruction cases, including first amendment freedom of religion arguments and more unusual claims involving parental choice. In almost all instances, however, courts reviewing these sometimes emotional cases affirm state regulations that are designed to ensure that all children receive a basic education.

Home instruction cases frequently are of long duration and sometimes involve parallel actions in state and federal courts. In one such case, a federal district court in Michigan considered a number of issues raised by parents educating their children at home using materials purchased from a not-for-profit school.[8] At the heart of the parents' eight claims was their argument that any state regulation of home instruction must be by the least restrictive means and that there must be a compelling state interest to justify the intrusion of the state into the basic right of parents to educate their children.

Courts traditionally hold that education is not a fundamental right, requiring a compelling interest test to weigh government regulation. Instead, courts use the less rigorous rational relationship test to review the rules. The Michigan district court followed this approach in reviewing the case. The plaintiffs sought to convince the court that early Supreme Court cases establishing the right of parents to educate their children in private schools conveyed a parental right to educate their children at home.[9] The district court, however, concluded that no such fundamental right was conveyed in the cases and that private school cases might better be read as supporting the power of states to enact reasonable educational regulations.

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[7] Blau v. State Bd. of Educ., 562 A.2d 586 (Conn. App. Ct. 1989).

[8] Clonlara, Inc. v. Runkel, 722 F. Supp. 1442 (E.D. Mich. 1989).

[9] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

The plaintiffs also sought to use *Wisconsin v. Yoder*[10] as authority for the parents' right to control the education of their children. *Yoder* involved the rights of Amish parents to terminate the education of their children after the eighth grade in order to control their religious upbringing. Courts, however, have been reluctant to expand *Yoder* to recognize religion-based exceptions to compulsory attendance laws advanced by non-Amish sects or by individuals with strongly held personal views. In the case at hand, the district court followed this trend, holding that the *Yoder* precedent centered on the religious upbringing of children, not their education.

In ruling against the plaintiffs on all counts, the district court also dismissed their claim that two teacher and administrator associations which had opposed home instruction had acted as official state agents that could be sued under 42 U.S.C. section 1983. The court also held that the eleventh amendment precluded all but injunctive relief from state officials and that the portion of the suit filed against the state superintendent also must be dismissed.

In a second Michigan case, this one heard by a state appeals court, the requirement that students who are educated at home be taught by a certified teacher again was upheld.[11] A similar result was obtained in 1986 when an evenly divided Michigan Supreme Court affirmed a lower court decision upholding the requirement.[12] In this latest case, the plaintiffs reported that they believed it would be a sin for them to submit to state authority by employing certified teachers. While admitting that the requirement did impose some burden on the plaintiffs' religious beliefs, the court characterized the burden as "minimal," pointing out that the plaintiffs were not precluded from hiring a certified teacher who conformed exactly to their religious perspective. The court also refused to use the compelling state interest test, holding instead that the requirement met the lesser rational relationship standard.

Maine's permissive statute on home instruction was challenged by parents who believed that any cooperation with a review of their home program would constitute a renunciation of their religious faith. Maine's home instruction statute permits home instruction if a student participates in annual standardized testing, or is reviewed annually by a certified teacher, or by a state or local home school advisory board. At one point, the plaintiffs in the case were given local approval after submitting materials to local school officials. They refused to accept it, however, asserting that their beliefs did not permit acceptance of any state approval.

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[10] 406 U.S. 205 (1972).

[11] State v. DeJonge, 449 N.W.2d 899 (Mich. Ct. App. 1989).

[12] Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).

The case continued, with Maine's high court finally concluding that universal education was "too precious" to allow some parents to "opt out, however high their motive."[13] The court held that the limited burden on the plaintiff's religious rights was outweighed by the state's interest in ensuring that all children received an education.

A Colorado intermediate court approved a home instruction program undertaken by parents who occasionally took their child to a private school for testing.[14] The Colorado home instruction statute permits home instruction by a certified teacher or after the home study program has been approved by the state. The wording of the state's private school statute, however, was changed in 1983. Prior to that time, the statute required students to "attend" such a school to satisfy state attendance requirements, but the language was changed to require that private school students be "enrolled." The court held that a student could be enrolled in the school without attending and allowed the home instruction to continue.

A Pennsylvania district court struck down that state's compulsory attendance law as being overly vague but stayed its ruling in the case to allow the state education secretary to promulgate new rules regarding the approval of home instruction programs.[15] The disputed statute permitted local school officials to allow "properly qualified private tutors" to provide home instruction, so long as "instructional standards" established by local school officials were met. This led to a wide variety of different school policies on home schooling which, the court concluded, violated the due process rights of the plaintiffs. In other states where local review of home instruction programs has passed constitutional muster, clearly detailed state rules govern the local review.

Finally, North Dakota parents asserted that public school officials were so biased in judging their request for an exemption from the compulsory attendance requirement for their daughter that their due process rights were violated.[16] The parents had applied for

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13. Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377 (Me. 1988).
14. *In re* D.B., 767 P.2d 801 (Colo. Ct. App. 1988).
15. Jeffery v. O'Donnell, 702 F. Supp. 516 (M.D. Pa. 1988).
16. State v. Brewer, 444 N.W.2d 923 (N.D. 1989).

the exemption under both the "economic hardship" and "physical or mental condition" sections of the state compulsory attendance law. Both claims had been denied. The North Dakota court refused to find that the district's slight economic interest, in the form of state per-pupil aid, caused the administrators to be biased.

Compulsory Attendance

Immunizations are required in all states prior to a child's entrance into public schools. The laws of the states contain exemptions for children residing in homes where the parents' religious beliefs preclude immunization, though the outbreak of a communicable disease can be grounds for asking the parents to withdraw their child. In recent years, cases have been filed by parents seeking to enroll their children without the required vaccinations who are not members of organized religions but who cite their personal religious beliefs as justification for an exception to the requirement. Such claims have been subject to close scrutiny by courts, and the parents do not always prevail.

The parents of a New York child sought such an exception and their request was denied. They then filed suit in federal court.[17] While the parents had spent years exploring various faiths, they belonged to no organized church. They were not opposed to all medical procedures and would accept injections to cure disease, but argued that their beliefs precluded them from "anticipating being ill." Confounding their claim, however, was the fact that their child three times had received a preventive oral polio vaccine. This was done, the parents testified, because one of the child's grandparents had insisted on providing the child with the protection. In spite of this damaging admission, the court ruled that the parents' beliefs were sufficiently strong that their religious rights would be infringed upon if the child were denied enrollment. For turning away the child on the first day of school, the school was required to pay the parents $1,000 in damages.

Attorneys' fees were the only question before a district court in another New York vaccination case.[18] Plaintiffs in the case had successfully challenged New York's statute that only members of organized religions could receive an exemption from the vaccination requirement. The court ordered fees and costs of approximately $7,500 to be evenly divided between the state and local district. The district argued unsuccessfully that it was only carrying out state policy and should be exempted from the payment.

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[17] Lewis v. Sobol, 710 F. Supp. 506 (S.D.N.Y. 1989).

[18] Levy v. Northport-East Northport Union Free School Dist., 708 F. Supp. 511 (E.D.N.Y. 1989).

In a more traditional compulsory attendance case, parents whose child had missed in excess of fifty days of instruction sought to avoid having their child declared to be in need of judicial supervision. The parents argued unsuccessfully that the school district had an obligation to notify them in writing which school the child was to attend and that the school had the burden of showing that the numerous absences were intentional.[19]

North Dakota parents claimed that they should be able to file a judicial appeal of their state superintendent's administrative decision not to exempt their child from compulsory attendance laws. The Supreme Court of North Dakota held that there could be no direct appeal of the superintendent's decision.[20] The parents had raised no legal challenge to the decision, but had argued that they were entitled to a *de novo* review of the action.

PRIVATE AND PAROCHIAL SCHOOLS

Private and parochial school cases fall into two general groups, both of which are represented in 1989 cases. The first group consists of challenges made to the provision of publicly financed materials or services to private school students, such as bus transportation or textbook loans. The second group of cases involves challenges raised regarding private school contracts with parents and the removal of students from such schools.

Massachusetts law gives local school districts the power to approve the secular course content of private schools within their district boundaries. In a case reported last year, a Massachusetts federal court set limits on the methods that districts could employ in the review process, holding that public school district officials could not visit the private school or examine curricular materials without violating the free exercise and establishment clause of the first amendment.[21] A private academy had asserted that it was a sin to submit their academic program to a public agency for approval and the court ruled that the voluntary use of standardized test scores their academic program to a public agency for approval and the court ruled that the voluntary use of standardized test scores repre-

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[19] *In re* Anthony C., 541 N.Y.S.2d 291 (Fam. Ct. 1989).

[20] Van Inwagen v. Sanstead, 440 N.W.2d 513 (N.D. 1989).

[21] New Life Baptist Church Academy v. Town of East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); *see* The Yearbook of Education Law 1988 at 73-4.

represented a constitutionally required less burdensome method of carrying out the required program approval.

The case was appealed to the First Circuit Court of Appeals, which overruled the district court.[22] The appeals court began its analysis of the case by first concluding that the free exercise clause did not preclude the state from requiring the program approval. The court held that the state had a compelling interest in ensuring that all children received an adequate education.

The lower court's ruling that the first amendment required the use of standardized tests or some other less-intrusive method to satisfy the state's interest received the bulk of the appeals court's attention. The court concluded that the use of the scores would "materially detract" from the state's effort to monitor the students, since test scores would report an after-the-fact failure of the educational program. The court observed that using tests also would involve the private academy in the same state approval process to which it objected in the first place, pointing out that the issues of test selection and score interpretation also would involve contact with public officials to resolve. Ultimately, the court concluded, it would be unworkable if every religious group could select the means for assessing its own programs. The appeals court quoted a recent Supreme Court decision, observing, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[23]

The loan of textbooks by public school systems to students enrolled in private schools was the subject of a Nebraska court test in 1989. The Nebraska legislation,[24] enacted in 1987, permitted the parents of private school children to make individual requests to local school officials and then to receive the textbooks. The Lincoln public schools refused to comply with a parent's request, and a legal challenge to the constitutionality of the law resulted.

The United States Supreme Court has upheld the constitutionality of textbook loan programs in the face of federal first amendment challenges,[25] so the issue for the Nebraska Supreme Court involved state constitutional issues. The Nebraska court, pointing to its previous decisions approving transportation assistance and student financial aid, held that the state constitution permitted the textbook loan.[26] The court also refused to find that the statute was unconstitutionally vague.

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[22] New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989).

[23] Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1327 (1988).

[24] Neb. Rev. Stat. § 79-4, 118 (Reissue 1987).

[25] Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

The parents of a student who was expelled from a Florida private school sought to recover part of the education costs they had paid to the school. The contract they had signed provided that the full charge for tuition, room, and board would constitute liquidated damages payable to the school in the event of expulsion. In spite of the fact that most holdings in previous cases of this type supported the school's claim for full payment, a state appeals court remanded the case to determine if a replacement student had been found for the expelled student.[27] If a replacement had been found, the court held that some credit for the replacement's revenue should be given.

Taxpayers who were successful in challenging their local district's payment of transportation costs for private school students brought suit seeking attorneys' fees.[28] While the plaintiffs had raised a variety of constitutional challenges to the transportation payment, they prevailed when a Massachusetts court ruled that the payment had been rescinded at a town meeting. The court had declined to reach the constitutional issues, and the school district refused to pay the fees, arguing that no payment was required when a party prevailed on the basis of a statutory interpretation. The appeals court disagreed, holding that the statutory claim was sufficiently intertwined with constitutional issues and that the plaintiffs therefore were entitled to fees.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Attempts to control the use of drugs by students and to curb the sale of controlled substances on school premises continue to generate a significant number of search and seizure cases. School search and seizure cases rely heavily on the holdings in the Supreme Court's 1985 decision in *New Jersey v. T.L.O.*.[29] *T.L.O.* involved the search of a student's purse for cigarettes. When marijuana and evidence that the student had been selling the drug in school were uncovered, sanctions were imposed and the student's attorney sought to have them rescinded, arguing that the search violated the fourth amendment. The Supreme Court rejected the claims filed on behalf of the student, affirming the principle that a school search could be conducted based on "reasonable suspicion" and directing that the methods used in school searches must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[30]

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[26] Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989).

[27] Perez v. Aerospace Academy, Inc., 546 So. 2d 1139 (Fla. Dist. Ct. App. 1989).

[28] Cronin v. Town of Tewksbury, 538 N.E.2d 22 (Mass. 1989).

[29] 469 U.S. 325 (1985).

Courts tend to weigh the reasonableness of searches by considering the methods employed and the extent to which the search is personally intrusive. Stricter review standards are applied when the student's clothing or body is being examined and lesser standards when the search involves a locker or car parked on school grounds. These issues were debated in a case that reached the Fifth Circuit Court of Appeals. The defending school district employed sniff dogs in a well-publicized attempt to control the bringing of narcotics to school. The dogs were used only in the school's parking lot. Under the school's well-publicized policy for these vehicle searches, the student driver would be summoned and asked to open the car when a dog alerted next to it. If the student refused to unlock the car, a parent would be summoned; if the parent also refused, the police would be called.

These steps were followed and, when the police arrived, the student's father refused to give his consent for the search. A police officer then took over the management of the issue and the school officials "stepped aside." The officer questioned the dog's handler regarding the dog's sniffing skills and sought advice from the county attorney. A probable cause determination was received from a judge, who then issued a warrant. Nothing was found in the car. The parent then filed a suit against the school and the police officer. A district court dismissed the complaint against school officials and the dog handlers, and a jury returned a verdict in favor of the police officer. The parent appealed and the appeals court sustained the lower court's dismissal of all of the constitutional claims advanced by the father.[31]

The appeals court also considered the lower court's unusual application of the damages provisions in 42 U.S.C. section 1988 and under rule 11 of the Federal Code of Civil Procedures. Rule 11 penalizes attorneys for pursuing frivolous claims. The lower court determined that the plaintiffs had violated rule 11 by continuing to include the school system in the litigation when it was "obvious" that the school was not involved in the actual search. The lower court awarded fees to the prevailing school system on the ground that all of plaintiff's claims, except those directed at the police officer, were frivolous and constituted harassment. The district court had observed that the father did not believe, and had even testified to the fact, that the school officials had played a significant role with the search.

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[30] *Id.* at 336.

[31] Jennings v. Joshua Indep. School Dist., 869 F.2d 870, *superseded,* 877 F.2d 313 (5th Cir. 1989).

The Fifth Circuit at first sustained the lower court attorneys' fee ruling, agreeing with the plaintiff's rule 11 challenge. The appeals court then reconsidered its decision on the matter and published a second opinion a few months later. The last paragraph of the first opinion was modified to remand the portion of the case related to the fees. The lower court had awarded $84,000 to the defendants, and the appeals court asked the lower court to reconsider this sum in light of an intervening Fifth Circuit decision calling for "more rigorous" review of large sanctions.[32]

Damages also were sought in a Tenth Circuit case involving the seldom-litigated claim of improper seizure.[33] Upon receiving statements from two students implicating a third student in a phoned bomb threat, a principal summoned the plaintiff to his office where a twenty-minute interrogation of the student occurred. The student's counsel attempted to convince the appeals court that the interrogation denied the student both liberty and property interests to such an extent that the fourth amendment ban on unreasonable seizure had been exceeded. Applying *T.L.O.* to the seizure case, the appeals court held that the brief questioning was "reasonably related" to the scope of the offense and ruled against the student on all issues.

Drug tests involving the use of urine or blood samples constitute a search under the terms of the fourth amendment. In 1988, a court upheld the use of urine tests for students wishing to participate in interscholastic athletics.[34] The district court departed from the requirement of individualized suspicion that was the hallmark of previous drug test cases, concluding that the use of testing only to determine eligibility for athletic participation distinguished the case at hand from other decisions. In late 1988, the Seventh Circuit affirmed the lower court decision.[35] The appeals court held that suspicionless searches must meet a higher standard of review. When failing the test, however, only meant missing a few sporting events, the court held that instituting the test program did not violate the fourth amendment.

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[32] Thomas v. Capital Security Servs., Inc., 836 F.2d 866 (5th Cir. 1988).

[33] Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989).

[34] Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988); *see* The Yearbook of Education Law 1989 at 71-2.

[35] Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

A Texas district court considered the need for individualized suspicion in a more omnibus student drug testing program and reached the opposite conclusion, concluding that a school district's program violated the fourth amendment.[36] The program required all students who wished to participate in any extracurricular activity to submit to a urine test. More than half of the student body therefore would be involved. In reviewing the program, the court found that it differed significantly from the Seventh Circuit case just discussed, which was much more narrow in scope. The court also suggested that two Supreme Court cases concerning drugs in the workplace,[37] handed down after the Seventh Circuit case, established a compelling interest standard not met by the school district's policy. Therefore the court enjoined the district from continuing its program.

A search of a purse owned by a Florida student, undertaken to find a knife, turned up cocaine instead. The student was searched when school officials received a report that she would bring the knife to school for use in a fight. The cocaine was discovered in a small plastic envelope in a zippered pocket within the purse. Attorneys for the plaintiff argued successfully that the search was unreasonable, since the tiny pocket where the drug was found was far too small to contain a weapon.[38] The appeals court characterized the search of the pocket as a "scavenger hunt." The facts of the case, however, bear a strong resemblance to those in *T.L.O.*, where the search of a purse continued after the principal had found the cigarettes for which he initially was searching.

The American Civil Liberties Union, legal counsel in several of the cases already discussed in this section, was the plaintiff in a Rhode Island case challenging the closed meetings held by a school board.[39] The meetings were closed in order to allow the board to plan the search of 800 student lockers by state and local police. The Rhode Island Supreme Court affirmed a lower court ruling that the closed meetings were permitted under a portion of the state open meeting law allowing the discussion of "security matters" in closed session.

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[36] Brooks v. East Chambers Consol. Indep. School Dist., 730 F. Supp. 759 (S.D. Tex. 1989).

[37] Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

[38] T.J. v. State, 538 So. 2d 1320 (Fla. Dist. Ct. App. 1989).

[39] Rhode Island ACLU v. Bernasconi, 557 A.2d 1232 (R.I. 1989).

First Amendment Religious Rights

Cases in which there is a claim that the first amendment establishment clause has been violated rely on the "test" established in *Lemon v. Kurtzman.*[40] A school policy can be upheld only if it satisfies each of three conditions. It must have a secular purpose, must neither advance nor inhibit religion, and must not foster excessive state entanglement with religion. Courts hearing most of the cases reported in this section applied the *Lemon* test to the facts of the cases they were considering. Courts reviewing school policies that allow invocations prior to commencement ceremonies or athletic events sometimes consider the Court's holding in *Marsh v. Chambers,*[41] a case that upheld the religious invocations that precede the daily meetings of the United States House and Senate.

Religious rights cases heard in 1989 covered a wide range of issues. Challenges were filed to special event invocations, to the rental of space in religious schools by public school systems, and to the use of school space by religious-based student groups before school and during activity periods. Less traditional issues also were considered. A federal court of appeals reviewed a ban on dancing that had been enacted by a school system, and district courts heard arguments in separate cases challenging a state flag salute statute and the right of a teacher to read the Bible during the school day.

The Ninth Circuit Court of Appeals weighed the first amendment claims of a student religious group that sought to use a classroom for before-school prayer. A district court had held that the use of the room would violate the establishment clause and that there was no violation of the Federal Equal Access Act[42] by the ban on the use of the room.[43] The lower court concluded that the prayer meetings would violate two prongs of the *Lemon* test by advancing religion and by fostering government entanglement with religion. The appeals court agreed, concluding that the use of the room was unrelated to the school's curriculum and would improperly use a tax-supported facility and involve staff supervision.[44] The appeals court also supported the lower court's ruling that the Access Act did not apply because all of the existing school clubs were directly related to the school's curriculum.

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[40] 403 U.S. 602 (1971).

[41] 463 U.S. 783 (1983).

[42] 20 U.S.C.A. § 4071 *et seq.* (West 1985).

[43] Garnett v. Renton School Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987); *see* The Yearbook of Education Law 1989 at 75.

[44] Garnett v. Renton School Dist. No. 403, 865 F.2d 1121, *superseded,* 874 F.2d 608 (9th Cir. 1989).

A different conclusion was reached in a second Access Act case. The Act requires schools to make space available to religious-based school groups if the school has created an "open forum" or a "limited open forum" by allowing other groups unrelated to the curriculum to meet. The Eighth Circuit Court of Appeals reversed a district court decision that had concluded that thirty clubs meeting in a Nebraska school all were related to the curriculum.[45] The lower court, in a slip opinion, had upheld the school administrators' decision not to allow the Bible club to meet during the after-school period. The lower court accepted the school system's argument that a chess club, scuba club, and two groups sponsored by Rotary International were directly related to the school's official program of instruction. The appeals court concluded that the Access Act would be rendered meaningless if such a broad definition of "curriculum" were adopted.

A school system ban on dancing also was considered by the Eighth Circuit. The ban prevented dancing on school premises, though "unofficial" school dances occurred elsewhere. After a strong community outcry from fundamentalist religious groups in favor of keeping the ban, the system board of education refused to change the policy and a lawsuit followed. Plaintiffs in the case argued successfully before a district court that the policy served no secular purpose, thereby violating the establishment clause.[46] The appeals court reversed, concluding, "[t]he mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."[47]

The rental of parochial school space for classroom purposes by public schools is sharply limited. The Supreme Court has held that the use of such space would convey the image to "impressionable" school children that there was a union between church and state.[48] In a case raising this issue, the rental of parochial school space by a Massachusetts school district was challenged in a federal district court by parents who objected to having their children in the school.[49] The lease itself was challenged because its terms required that the space could not be used in any way "inconsistent with the teachings of the Roman Catholic Church."

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[45] Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989).

[46] Clayton v. Place, 690 F. Supp. 850 (W.D. Mo. 1988); *see* The Yearbook of Education Law 1989 at 74.

[47] Clayton v. Place, 884 F.2d 376, 380 (8th Cir. 1989).

[illegible] pids School Dist. v. Ball, 473 U.S. 373 (1985).

[illegible] Bridgewater School Dept., 722 F. Supp. 834 (D. Mass. 1989).

A challenge also was raised to other aspects of the arrangement. While the most obvious religious symbols in the rented classrooms were covered with cloth, other symbols remained in hallways and at entrances. In addition, a priest welcomed the students at the door of the school on most mornings. The district court held that the rental represented an entanglement between church and state and granted a preliminary injunction to the parents ordering the public system to allow students to be reassigned. The court also gave the defendants a short period to respond before it would consider issuing a summary judgment on the other issues raised by the plaintiffs.

The United States Supreme Court ruled in 1943 that local school authorities could not require students to participate in a flag-salute ceremony or to recite the Pledge of Allegiance.[50] An Illinois statute, however, requires the daily reciting of the pledge by pupils in elementary schools.[51] The plaintiffs challenging this statute, members of the Society of Separationists, did not wish their children to participate in the salute. They raised an establishment clause challenge to the words "under God" in the pledge and argued that their free exercise rights were curbed by the statute.

An Illinois district court rejected a motion by the defending school district that the case be dismissed.[52] The court held that the plaintiffs stood little chance of succeeding with their challenge to the wording of the pledge, which has been upheld on numerous occasions. But the court was unimpressed with the school district's attempt to distinguish the case at hand from the Supreme Court's flag-salute decision in 1943. The district argued that the lack of a penalty clause in the Illinois statute rendered participation voluntary, but the court observed that school disciplinary proceedings could be invoked against children failing to participate.

A variety of first amendment religious issues were mingled with arguments regarding academic freedom in a case heard by a Colorado district court.[53] The plaintiff, a fifth-grade teacher, kept a Bible in full view on his classroom desk and read silently in it during the class "free reading" period. He also had placed books about the Bible and Jesus in his classroom library. A lawsuit commenced when the school's principal asked the teacher to remove the books from the library, and to place the Bible inside his desk and to refrain from reading it during the school day.

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[50] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[51] Ill. Rev. Stat. ch. 122, § 27-3 (1980).

[52] Sherman v. Community Consol. School Dist. 21, 714 F. Supp. 932 (N.D. Ill. 1989).

[53] Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989).

The district court upheld the principal's actions in the case, holding that they promoted the religious neutrality that is mandated by public school establishment clause cases. Observing that impressionable fifth graders would receive a religious message if their teacher read only the Bible during the reading period, the court also concluded that it was within the school's discretionary powers to order a halt to the practice. On the claim that the teacher's academic freedom was curbed, the court held that the "natural tension" present when the free speech and establishment clauses conflict must, in this case, be resolved by limiting the teacher's autonomy.

Challenges to invocations before athletic events or commencement ceremonies have ended with mixed results. Pregame invocations in a Georgia district that sometimes closed with the words "in Jesus' name we pray" were the subject of a case heard by the Eleventh Circuit Court of Appeals.[54] The school system had sought to implement an "equal access" plan that would involve members of the community offering "inspirational messages" before games, but the proposal found the support of only one of the three jurists hearing the case. The majority held that the "equal access" scheme was merely a subterfuge for continued religious messages, observing that the district had refused to implement a policy that only secular invocations would be used. The majority also refused to find that *Marsh* provided support for the practice of offering prayers, suggesting that while prayers were present at the start of legislative sessions at the time the United States Constitution was ratified, football pregame prayers were not. Attorneys' fees also were sanctioned in the case.

Prayers before and after high school commencements were approved by a California state court, in the face of both federal and state constitutional challenges.[55] Using the *Lemon* test, the appeals court concluded that the prayers were used for a secular purpose, since they were designed to establish a solemn tone for a secular occasion. The court concluded that the invocation policy could pass muster even though the messages were not "exclusively" secular. The United States Supreme Court has never resolved the conflict among jurisdictions regarding the constitutionality of commencement prayers.

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[54] Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989).

[55] Sands v. Morongo Unified School Dist., 262 Cal. Rptr. 452 (Ct. App. 1989).

A New York appeals court considered a challenge brought against that state's requirement that all public school children receive instruction with regard to AIDS and alcohol and other drug abuse.[56] The plaintiffs argued that their free exercise rights were violated and that such instruction was inherently "evil." The court disagreed, observing that students could be excused from the "prevention" portion of the AIDS curriculum. It concluded that the state had a compelling reason for the instruction while the plaintiffs lost no significant religious freedom.

A Florida local government resolution, passed by a city council and signed by the mayor, urging residents to participate in a day of "nondenominational, voluntary prayer" in support of the city's antidrug efforts was challenged in federal court.[57] Schools were targeted in the resolution, and the attack on the prayer day focused in part on the constitutionality of asking school children to pray. No public funds were expended in the program, and the resolution also urged citizens to meditate or engage in "other appropriate solemn dedication." Given the breadth of the resolution and its lack of coercion of any kind, the court dismissed the plaintiff's request for an injunction stopping the program.

First Amendment Freedom of Expression

The United States Supreme Court decision in *Hazelwood School District v. Kuhlmeier*[58] continued to dominate expression cases in 1989. *Hazelwood* involved the deletion by a principal of two pages of a high school newspaper that contained stories about student pregnancy and drug use. The paper, which was produced as part of a journalism class, was published with two blank pages. In upholding the principal's action, the Court concluded that the paper was not a forum for public expression and went on to find that "educators do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[59]

What constitutes "legitimate pedagogical concerns" was broadly applied by lower courts in 1989, with the regulation of student expression being upheld in a number of cases. In a case heard by the Ninth Circuit Court of Appeals, Planned Parenthood lost in its attempt to force the publication of family planning advertisements in a school system's student newspapers, yearbooks, and athletic event programs.[60] The plaintiffs alleged that the publications were public forums, but the appeals court rejected the argument, holding instead that the acceptance of some advertising did not necessarily create an open forum. Citing *Hazelwood*, the court concluded that school districts had "wide latitude" to control the content of school-sponsored publications and that it was reasonable for the district to conclude that the ads were incompatible with the educational mission of the schools.

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[56] Ware v. Valley Stream High School Dist., 545 N.Y.S.2d 316 (App. Div. 1989).

[57] Allen v. Consolidated City of Jacksonville, 719 F. Supp. 1532 (M.D. Fla. 1989).

[58] 484 U.S. 260 (1988).

[59] *Id.* at 273.

A student running for student council president in a Tennessee school made fun of an administrator while delivering a student assembly speech and was removed from the ballot by the school's principal. A district court ruled that the student's first amendment rights had not been violated and the Sixth Circuit upheld the decision.[61] Citing *Hazelwood*, the appeals court majority concluded that the school was exercising appropriate control over student expression in a school-sponsored event.

In dissent, one judge hearing the case observed that the speech contained no invasion of student privacy, the issue that was central in *Hazelwood*. The dissent then relied heavily on *Tinker v. Des Moines Independent School District*,[62] a case involving the wearing of a protest armband. *Tinker* established a "material disruption" standard under which student expression could be limited. The requirement that material disruption be reasonably forecast runs counter to the thrust of the more recent *Hazelwood* ruling. In the case at hand, the dissenting judge argued that the student's nominating speech could not be suppressed because it was purely political in nature and caused no disruption.

The *Tinker* disruption argument also was used in two cases that involved the proposed distribution of a magazine published by a national group, Student Action for Christ. The fact situations in the two cases were similar. In each, students were prevented from distributing the magazine and a lawsuit followed. In the first case, a rule that limited the time and place of the distribution was upheld in the face of a *Tinker* argument presented by the plaintiffs that they should be free to distribute the magazine at will, so long as no disruption occurred.[63] In the second, an absolute ban on the distribution of religious publications, enacted by a school district, was held to be unconstitutional.[64] Again, however, the claim by the plaintiffs that they should be able to distribute without time and place limits was rejected.

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[60] Planned Parenthood of Southern Nev., Inc. v. Clark County School Dist., 887 F.2d 935 (9th Cir. 1989).

[61] Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989).

[62] 393 U.S. 503 (1969).

The attempt by the board of education and school officials in Atlanta to regulate speakers at a career day returned to the Eleventh Circuit. The litigation started in 1984 and so far has resulted in five published decisions. A 1988 federal court decision held the district's policies regulating who could participate in the career day were designed to exclude peace activists who wished to offer their point of view about military service as an occupation.[65] The court decided that this viewpoint discrimination violated the first amendment. On appeal, the Atlanta system argued that *Hazelwood* gave the district the power to control the career day program content. The appeals court disagreed, holding that once the system had opened a topic for discussion by outsiders it could not reasonably prohibit an opposing point of view from being heard.[66]

Issues surrounding the removal of books from school libraries and curriculums were heard by two California courts of appeal. A California school board voted to remove books written by poet and novelist Richard Brautigan from the school library, and a teacher whose students were reading the books as part of a high school class brought suit to stop their removal. An appeals court declined to rule on a host of constitutional challenges, instead deciding the case on an interpretation of state law. The court held that California statutes gave the school boards of the state the power to create school libraries but did not contain the authority to remove books from them.[67] The court's holding is reminiscent of a scattering of school library cases from a decade ago that held that library books once selected acquired "shelf tenure" and could not be removed.

In the second California case, a school board removed *Grendel*, by John Gardner, and *One Hundred Years of Solitude*, by Gabriel Garcia Marquez, from the school's English curriculum. In the case of the Gardner novel, all the parents of students in a senior-year English class had signed a slip granting permission for their children to read the book. The appeals court held that *Hazelwood* gave school officials broad power to make decisions about the appropriateness of curricular materials, but also noted that these decisions must be based on what the decision referred to as "legitimate pedagogical concerns." Finding that the record was incomplete concerning the motives of the board for excluding the books, the court remanded the case for a determination of the board's motives.[68]

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[63] Nelson v. Moline School Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989).

[64] Rivera v. East Otero School Dist. R-1, 721 F. Supp. 1189 (D. Colo. 1989).

[65] Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988); *see* The Yearbook of Education Law 1989 at 78-9.

[66] Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989).

[67] Wexner v. Anderson Union High School Dist., 258 Cal. Rptr. 26 (Ct. App. 1989).

SANCTIONS FOR STUDENT MISCONDUCT

This section is divided into three parts. Challenges to student suspensions and expulsions are discussed in the next portion, and those questioning the use of corporal punishment are detailed in the third. In this introduction, unusual cases that argue issues associated with other disciplinary penalties are reported. The three 1989 cases that fall into this category all were heard by federal courts of appeal. They raise unusual issues — the denial of permission to participate in an instructional program based on an unwritten "good citizenship" rule, the "crediting" of the time taken by disciplinary hearings toward the penalty imposed, and the denial of federally funded school lunches to students serving in-school suspensions.

The Eighth Circuit Court of Appeals heard a challenge to a school district's unwritten "good citizenship rule" that was invoked to prevent a student from entering an off-campus vocational program.[69] Also considered in the case was the fact that the student would be allowed to participate upon paying $1,375 in tuition. The district's denial of the student's participation was challenged on equal protection grounds, based on the fact that only students from poor families would be excluded.

The student was studying auto mechanics in the off-campus program and was not allowed to continue when he was found guilty of a theft charge that involved stolen auto parts. The student was placed on probation for the theft, which occurred at a site different from the vocational school where he was studying auto repair. A divided appeals court sustained the school's action. The majority concluded that "adjudicated juvenile delinquents" were not a suspect class for the purpose of equal protection analysis and that the school's denial was based on "legitimate school objectives."

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[68] McCarthy v. Fletcher, 254 Cal. Rptr. 714 (Ct. App. 1989).

[69] Felton v. Fayette School Dist., 875 F.2d 191 (8th Cir. 1989).

In a sharply worded dissent, the dissenting judge refused to characterize the school's decision as having been based on a "rule" that, in fact, did not appear in the school's curriculum handbook. Because no such "rule" actually existed, the dissent argued that the majority had constructed and decided a "hypothetical case" that was not supported by the record. The dissenting judge argued that the tuition requirement constituted an "arbitrary sanction" and that the school district's decision had created a situation where "rich, delinquent students will not be deprived of their right to educational benefits, but poor, delinquent students will.[70]

The Bridgeport, Connecticut school system was accused of violating a state law that establishes 180 days as the maximum suspension period that can be invoked in a disciplinary proceeding. Counsel for a student who brought a loaded gun to school in order to sell it to another student brought the suit, arguing that the student should receive credit for the days the student was out of school waiting for the case to be resolved. It also was argued that the school system had an obligation to tell the plaintiff's counsel that the delays the counsel was seeking during the hearing process would not be credited toward the 180-day penalty.

The Second Circuit Court of Appeals rejected the plaintiff's claims.[71] The appeals court concluded that the plaintiff had failed to appeal the decision of the board denying the time served under state administrative procedures and that the board had offered sufficient justification for its decision, such that it could not be shown that the decision was arbitrary. The district had argued that the allowance of the time served would return the student to school in March, too late in the academic year for the student to make meaningful progress.

A Michigan school district enacted an in-school suspension policy that would cause some students to be denied their federally funded school lunch. After objections to the policy were filed, the district modified its terms. Under the revised policy, students were allowed to eat their lunch in the company of a parent, or could be sent home if no parent was available. A legal challenge to the use of a federally funded meal program as a school disciplinary sanction then was initiated. Federal rules were introduced before the district court; the rules stated that the use of meal denials in a "disciplinary action" was "inconsistent with the law."

A lower court decision in favor of the plaintiffs, based on the lunch program rules, was overturned by the Sixth Circuit Court of

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[70] *Id.* at 196.

[71] Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989).

Appeals. The appeals court failed to reach the major issues in the case, concluding instead that the plaintiffs lacked standing to bring suit.[72] Standing was lacking, the appeals court concluded, because the plaintiffs had failed to show that the injuries they claimed they would suffer would be redressed by the requested relief. The district's alternative penalty for rule infractions, the court reasoned, would be for the district to suspend students for an entire day. This too would have the effect of denying a student the subsidized lunch. The plaintiffs were invited to challenge the lunch penalty by seeking relief from the United States Department of Agriculture or from the Michigan Department of Education.

Suspensions and Expulsions

The suspension and expulsion cases that follow rely heavily on the holdings of the Supreme Court in *Goss v. Lopez.*[73] *Goss* established the requirement that students could not be subjected to short suspensions from school, lasting ten days or less, without receiving a brief hearing. The hearing must afford the student an opportunity to learn why a suspension is occurring and the student must be given a chance to tell an administrator his version of the event. Additional due process is required for suspensions in excess of ten days. Charges that the hearing a student received was faulty are made in almost all suspension and expulsion cases.

In a case heard by a federal appeals court, the father of a student who was suspended from school for ten days and from the football team for sixty days claimed that the extracurricular penalty required a hearing more elaborate than the one he had received. The court disagreed.[74] The parents did not contest the ten-day academic suspension after their son admitted he smoked marijuana and drank beer in the school radio station. The parents, however, only found out at a board of education meeting discussing the first suspension that the extracurricular penalty also was being considered. The father was given thirty minutes to argue that the penalty was excessive before the board approved it.

The appeals court concluded that the father's appearance before the board satisfied the *Goss* hearing requirement and that nothing in *Goss* required the school district to detail the possible penalties that might be imposed by a board at a hearing. The court majority also refused to find that the student had a property right that was implicated by his removal from the football team. In dissent, one of the judges hearing the case argued that sport participation was rapidly moving from being a "privilege" to being a "right." The dissent concluded that the student had, indeed, lost a significant property right, perhaps a football scholarship that would be his "only avenue to a higher education."

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[72] Heimberger v. School Dist. of Saginaw, 881 F.2d 242 (6th Cir. 1989).

[73] 419 U.S. 565 (1975).

[74] Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989).

Courts generally have protected the identity of student informants in cases where the information they provide leads to school disciplinary penalties. This issue again was argued in a case heard by the Sixth Circuit.[75] A student was given a ten-day suspension for offering to sell another student a white powder that was advertised as cocaine. The powder, however, was a harmless "look-alike" substance. The student's suspension was based on evidence contained in a written statement made by an unnamed student. The suspended student's counsel was not given the opportunity to see the statement or to cross-examine the student making it.

The student's attorney sought the right to cross-examine the student providing the statement, citing a sentence in the *Goss* decision as authority for the request. The sentence reads, " in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required."[76] It was argued that a drug charge of the sort being made was so stigmatizing to the student's future career that it represented an "unusual situation" of the sort described. The court disagreed, holding that a ten-day suspension of an eighth-grade student would not lead to the future consequences described by the student's counsel.

The attorney representing a student given a ten-day suspension by his principal for assaulting another student and an additional ten-day suspension by the district superintendent for the same offense claimed that the student should have been afforded additional due process.[77] The student had injured a classmate while they were fighting by using a strip of leather in which carpet tacks had been embedded. Prior to the superintendent's decision, a hearing at which the student was represented by counsel was held. A state appeals court concluded that more than adequate due process had been afforded by the hearing for a suspension that totaled twenty days.

A high school senior visiting a college with his parents consumed a beer with his lunch, returned to school in time to attend wrestling practice, and was suspended from school when a coach detected alcohol on his breath. That the student had consumed the beer with his parents' permission was irrelevant to school officials, who punished him under the provision of a school code that prohibited students who "were under the influence" from attending school. An appeals court overturned the student's suspension from school and the district appealed. The Ohio Supreme Court, by a 4-3 margin, held that the broad discretionary powers granted to local school districts conferred sufficient authority for the district to suspend the student, even given the facts in the case at hand. The dissenting opinion argued that the suspension should be set aside because there was no evidence that the student actually was "under the influence of alcohol" when he went to the afternoon practice.

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[75] Paredes v. Curtis, 864 F.2d 426 (6th Cir. 1988).
[76] 419 U.S. at 584.
[77] Reasoner v. Meyer, 766 S.W.2d 161 (Mo. Ct. App. 1989).

An Alabama student who had been sent to the principal's office approximately twenty times in three years was expelled when he struck a fellow student. The student appealed the decision of a juvenile court that had upheld the expulsion, essentially asking the appeals court to find that the penalty was excessive. The appeals court observed that the student previously had been subjected to every punishment that the school system employed, but still continued to misbehave. The appeals court concluded that this record justified the expulsion.[78]

Corporal Punishment

All corporal punishment cases contain essentially the same set of facts. A student misbehaves or fails to perform to the satisfaction of a teacher. The student then is paddled and sustains what the student's parent or guardian believes is a severe injury. The school system disagrees and a court is left to determine if the injury was so severe that the paddled student's substantive due process rights were violated.

The Supreme Court held in *Ingraham v. Wright*[79] that corporal punishment was permissible and that the student plaintiff in that case, who had received twenty blows from a wooden paddle and lost the use of an arm for a week, was free to seek state and common law remedies for the injury. The Court, however, left unsettled the question of whether excessive force might in a future case constitute a substantive due process violation.

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[78] Scoggins v. Henry County Bd. of Educ., 549 So. 2d 99 (Ala. Civ. App. 1989).
[79] 430 U.S. 651 (1977).

Since *Ingraham,* lower federal courts have used a "shock the conscience" test in weighing these substantive due process claims.[80] In a frequently cited Fourth Circuit case, the appeals court held that to sustain a substantive due process claim a court must find that "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[81] Given this standard, plaintiffs almost never are successful.

The parents of a nine-year-old student who was paddled seven times filed a substantive due process claim in a Kentucky district court.[82] A doctor and a policewoman had testified that the bruises the child received were "excessive," but the court concluded that they did not approach the level necessary to "shock the conscience." The parents were left free to pursue state court claims.

Factual issues left unresolved caused a Missouri district court to refuse to issue a summary judgment in favor of a school system in a more complicated corporal punishment case.[83] The district had a policy prohibiting corporal punishment, and the teacher in question had been reprimanded previously for striking a child. In the current incident, the teacher struck two children without warning, using a plastic baseball bat. The children suffered a variety of injuries when they were hit on the head and elsewhere. The district court concluded that this set of facts warranted consideration of the plaintiffs' substantive due process claims by a jury. The case was continued on the court's calendar.

A similarly distressing set of facts caused a Georgia appeals court to overrule a lower court and order a jury trial in a case that started when a principal broke a second-grade student's arm.[84] The student had failed to bring his homework to school and was brought to the principal's office for punishment. Depending on which version occurred, the crying student either was on the floor of the office and was jerked upright by the principal, breaking the arm, or the student struggled during the administration of the punishment and the arm was broken. The majority on the appeals court held that the factual dispute should be resolved by a jury. The minority argued that the paddling itself was not excessive and that the broken arm should not be viewed as part of the punishment. Dissenting judges favored favored dismissing the case.

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[80] This "test" originated in police brutality cases. *See* Rochin v. California, 342 U.S. 165 (1952).

[81] Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[82] Brown v. Johnson, 710 F. Supp. 183 (E.D. Ky. 1989).

[83] Turley v. School Dist. of Kan. City, Mo., 713 F. Supp. 331 (W.D. Mo. 1989).

[84] Crews v. McQueen, 385 S.E.2d 712 (Ga. Ct. App. 1989).

In another Georgia case, parents of a child who had "superficial" bruises from a paddling brought suit.[85] A psychologist attempted, unsuccessfully, to convince a lower court that the child suffered from "post-traumatic stress disorder" as a result of the paddling. Evidence that the child was laughing and playing shortly after the paddling was sufficient evidence for the appeals court to sustain a summary judgment in favor of the school district.

Bruises still visible after a week convinced a court that a student's paddling was excessive and that the names of those administering the punishment should remain on a list of "known child-abusers."[86] A social service agency had put the two school administrators on the list after concluding that the child did not bruise easily and that excessive force must have been used if the bruise remained after a week. In dissent, one judge observed that the agency's rules regarding "excessive force" were unwritten and that there was no actual evidence that excessive force had been used.

BILINGUAL-BICULTURAL PROGRAMS

The failure of plaintiffs to prevail with challenges to the adequacy of local school district bilingual programs may be the source of the decline in the volume of litigation seen in this area five years ago. In the single 1989 case in this area, plaintiffs representing non-English-speaking students again were unsuccessful.[87] The plaintiffs argued that the Berkeley schools had failed to provide adequate programs, thereby violating the Equal Educational Opportunities Act of 1974 (EEOA) and title VI of the Civil Rights Act of 1964.

The plaintiffs argued that the district had violated the EEOA by failing to provide qualified teachers, sufficient supporting resources, and necessary monitoring systems. They also argued that students were being passed from the program without receiving adequate bilingual programming. In weighing these claims, the district court used the criteria contained in a Fifth Circuit decision that have been used since 1981 by courts in cases challenging language remediation programs.[88] To pass muster, a bilingual program must be informed by sound educational theory, must employ methods that are reasonably calculated to implement the theory, and must produce results showing that the student's language barriers are being overcome.

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[85] Mathis v. Berrien County School Dist., 378 S.E.2d 505 (Ga. Ct. App. 1989).

[86] B.L. v. Department of Health and Rehabilitative Servs., 545 So. 2d 289 (Fla. Dist. Ct. App. 1989).

[87] Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989).

In the eyes of the district court reviewing Berkeley's program, the theory used by the system was "manifestly as sound" as that proposed by the plaintiffs. As to the program's implementation, the court found that the near-bankruptcy of the system precluded the spending of the resources called for by the plaintiffs and it refused to order that additional resources be spent. The court also held that the students' test scores suggested that they were doing as well as other students in similar California programs. In addition, the court rejected the plaintiff's title VI challenge, asserting that they had failed in the requirement to show discriminatory intent on the part of the system.

DESEGREGATION

The number of cases concerning school desegregation remained constant in 1989, with most involving disputes in the implementation of desegregation plans. The cost of remedies was the central issue in many of these cases. Three other cases involved challenges to school transfer policies that were alleged to encourage the movement of white students away from schools with large minority populations.

Cross-district Remedies

School district policies that permitted "zone jumping," the transfer of white students out of predominantly minority schools into those with more white students, were reviewed by the Eleventh Circuit. In a series of unpublished decisions, a district court had held that the transfers should be permitted because they had only a slight effect on the racial composition of the schools in question. The appeals court reversed, holding that the cumulative effect of the transfers on the schools' racial composition, just under 10%, was not the only factor that needed to be considered.[89] Based on previous decisions, the court observed that a "qualitative" analysis also was required to determine whether a school was assuming a "racial identity."[90] Looking at the transfers from that perspective, the appeals court held that some schools in the area were in danger of being known as "white schools" and that the transfers therefore were constitutionally impermissible.

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[88] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

[89] United States v. Lowndes County Bd. of Educ., 878 F.2d 1301 (11th Cir. 1989).

A Mississippi city joined the federal government in requesting the consolidation of the city and county school districts, arguing that illegal guardianships were being used to facilitate white student transfers to the county district.[91] In addition to the guardianships, made only for the purpose of creating a school address different from the one where the student actually resided, some white students attending the county schools were listing fictitious addresses. Testimony in the case revealed that the county district made no attempt to verify student addresses, though the district previously had assured the Office of Civil Rights in writing that it was, in fact, making the checks.

In spite of this evidence and the district court's comment that consolidation would be "beneficial" to the districts, the court refused to find a constitutional violation. The court held that the lack of student address verification resulted in a lack of information that precluded the court from deciding that the transfers were of such significance that judicial intervention was needed. The court neither ordered the district to collect the data nor considered the "racial identity" issue presented in the previous case.

Plaintiffs in the long-standing Kansas City, Missouri, desegregation case attempted to force suburban school districts to admit minority transfer students by filing a separate lawsuit. The plaintiffs argued that genesis of their action originated in a footnote to a 1986 Eighth Circuit decision in the Kansas City case. The footnote stated that the failure of a district to participate in an interdistrict transfer program could be evidence of a constitutional violation.[92]

In viewing the plaintiffs' case, however, the court could find no evidence that the students seeking transfer had been treated any differently that any other prospective transfers, or that they had been denied a transfer based on their race.[93] Using strong language, the court went on to conclude that the plaintiffs, in fact, had failed to present "any evidence to suggest that this specific lawsuit had any basis in fact or in law." The court then granted the defendants' request that their court costs be paid by the plaintiffs.

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[90] *See* Lee v. Eufaula City Bd. of Educ., 573 F.2d 229 (5th Cir. 1978) (composition of schools after student transfers and a qualitative judgment concerning the effect of transfers on desegregation both must be considered).

[91] United States v. State, 719 F. Supp. 1364 (S.D. Miss. 1989).

[92] Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986), *cert. denied sub nom*, Kansas City, Mo. School Dist. v. Missouri, 108 S. Ct. 70 (1987).

[93] Naylor v. Lee's Summit Reorganized School Dist. R-7, 703 F. Supp. 803 (W.D. Mo. 1989).

The question of which party must pay for various components of the St. Louis desegregation plan continued to be argued in 1989, with the state seeking to limit its financial role in supporting the interdistrict transfer of 15,000 students. The state sought to terminate its support of individual local school district desegregation efforts once a suburban district had reached its goal under the court-approved plan, even though the cumulative 15,000 student goal had not been reached. In the first of two 1989 Eighth Circuit decisions that addressed this issue, the appeals court upheld the state's position and permitted the halt in funding to districts that had exceeded their individual goal.[94] After a request for "clarification" from the district court, however, the appeals court withdrew its first opinion and issued a revised opinion ordering the state to continue the payments.[95]

The district court hearing the St. Louis case also reviewed an unsolicited student reassignment plan submitted by the state.[96] The court had ordered the city board to prepare such a plan, but the state stepped in and presented a plan that the court characterized as "contravening" the court's previous directives. The plan proposed the closing of thirty-four schools and, while it was cost-effective, the court found it "too drastic" and lacking "a human touch." The plan also contained a number of obvious mathematical errors which undermined its reliability from the court's perspective. To resolve the assignment issue, the court directed the state to join with the local district, relinquishing their previous "antagonistic attitudes" toward one another, to develop a reassignment plan for the 1990-91 school year. If the attempt failed, the court expressed its intention to select an independent committee to carry out the job.

A settlement in the Little Rock desegregation dispute involving three districts relied on the passage of state funding legislation. Unfortunately, the funding was held up by a series of events that a district court characterized as "bizarre." In the meantime, the district court refused to find that the state funds were available to fund the settlement.[97] The court went on to appoint a supervisor who would have the responsibility for developing a workable student assignment plan. The court also approved a series of recommendations from the special master overseeing details of the desegregation plans already being implemented in each of the districts.

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[94] Liddell v. Board of Educ., St. Louis, 873 F.2d 191 (8th Cir. 1989).

[95] Liddell v. Board of Educ., St. Louis, 882 F.2d 298 (8th Cir. 1989).

[96] Liddell v. Board of Educ., St. Louis, 718 F. Supp. 1434 (E.D. Mo. 1989).

[97] Little Rock School Dist. v. Pulaski County Special School Dist., 716 F. Supp. 1162 (E.D. Ark. 1989).

A Virginia plaintiff brought an action seeking to have the Secretary of Education halt all federal funds granted to the state of Virginia until changes were made in the educational program offered to the plaintiff's child.[98] The court dismissed the plaintiff's title VI claim for lack of subject matter jurisdiction, holding that the termination of funding would encroach on the powers of the federal executive and legislative branches. The court also found that the plaintiff lacked standing to bring the suit because the cutoff of aid would not assure that the alleged discrimination would necessarily end, even if the funding ceased.

Desegregation Plan Oversight

Cases involving the oversight of desegregation plans move back and forth between federal district courts and courts of appeal, often rapidly, as local adjustments to plans are made and challenged. In many of these cases, claims that a school district has achieved unitary status and should be relieved of court supervision are considered. The Supreme Court has never spoken clearly with regard to the standards that lower courts should use in considering such claims, and the standards vary substantially from circuit to circuit.[99]

The question of whether a school district must achieve desegregation in all areas, such as student and staff assignment, simultaneously, or could do so piecemeal, was at issue in 1989 cases. So too was the issue of whether a previously declared unitary system still must comply with injunctions. Federal courts of appeal have been divided on both issues.[100]

The Eleventh Circuit Court of Appeals considered the question of piecemeal compliance and unitary status in a case involving the DeKalb County, Georgia, school district.[101] A district court had held that the system had not achieved unitary status because its assignment of teachers and administrators still showed substantial racial imbalance. The same court, however, had dismissed the school system from court supervision in the area of student assignment. The appeals court overruled the lower court on the assignment question, holding that a school district must simultaneously and for three years meet all six factors in *Green v. County School Board.*[102] The areas where racial balance must be found are student assignment, faculty, staff, transportation, facilities, and extracurricular activities.

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[98] Abramson v. Bennett, 707 F. Supp. 13 (D.D.C. 1989).

[99] *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 Harv. L. Rev. 653 (1987).

[100] *See* The Yearbook of Education Law 1988 at 98-9.

[101] Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989).

The Eleventh Circuit also overruled a district court that had found that the Duval County, Florida, schools had achieved unitary status.[103] The appeals court found that teacher and administrative staff assignments closely matched the white-to-black ratio in each school, such that segregated schools also had segregated staffs. In addition, the use of portable classrooms and leases perpetuated the existence of mostly one-race schools.

A Mississippi district court considered a motion made on behalf of the Choctow County school district that its schools be declared unitary.[104] The court rejected the motion, finding that evidence suggested continued segregation in four separate areas of the system's operation. The court also awarded back pay to a minority staff member who three times had been passed over in favor of white candidates when seeking a principalship. The former principal, who lost his job when schools were combined to facilitate desegregation, was entitled to the job under the requirements of a 1969 Fifth Circuit decision regarding staff displacement.[105]

A federal district court and the Tenth Circuit Court of Appeals continued to reach opposite conclusions regarding desegregation in Oklahoma City. The appeals court held in 1986 that while the district had been declared unitary a decade earlier, the failure of the lower court to dissolve its desegregation decree meant that the case could be reopened without a new finding of segregative intent on the part of the school system.[106] In a 1987 decision ignoring the appeals court, the lower court persisted in placing the burden of proof on the plaintiffs to show that residential patterns rather than board action were not the cause of segregated schools. Again the appeals court reversed.[107] In its latest decision, the appeals court once more lectured the lower court on how to review the case, telling it to abandon its consideration of discriminatory intent and to focus its efforts on evaluating the district's assignment plans.

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[102] 391 U.S. 430 (1968).

[103] Jacksonville Branch, NAACP v. Duval County School Bd., 883 F.2d 945 (11th Cir. 1989).

[104] United States v. State, 725 F. Supp. 307 (N.D. Miss. 1989).

[105] Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

[106] Dowell v. Oklahoma City Pub. Schools, 795 F.2d 1516 (10th Cir. 1986); *see* The Yearbook of Education Law 1989 at 90-1.

[107] Dowell v. Board of Educ. Oklahoma City Pub. Schools, 677 F. Supp. 1503 (W.D. Okla. 1987), *vacated and remanded*, 890 F.2d 1483 (10th Cir. 1989).

A Georgia court considered a proposal made by the Savannah schools to end that city's longstanding desegregation dispute.[108] The board plan relied on the use of revised attendance zones, magnet programs in predominently black inner-city schools, and a majority-to-minority transfer plan to desegregate predominantly white schools. Plaintiffs in the case criticized the plan for placing an excessive burden on black students and for relying too heavily on voluntary techniques. The court disagreed, affirming the plan and praising it for its use of "ambitious yet realistic" goals.

An appeal of the Savannah decision was filed and the Eleventh Circuit affirmed with minor modifications.[109] The federal government, in its brief, asked for increased integration within the magnet schools so that white students would come in contact with more minority students in nonmagnet courses. The appeals court asked the lower court to incorporate this recommendation in its final order and to consider the use of some magnet programs in mostly white schools.

The attempt by the federal government to have a number of Georgia school districts declared unitary continued in 1989. The government filed the request without the consent of either the plaintiffs or the defendants in the original cases. Both sides were perfectly happy to remain under court supervision and had no interest in reopening the long-dormant litigation. After the United States agreed to pay certain of the costs associated with litigation on unitary status, a district court declined to dismiss the case.[110] The court, however, characterized the government's position as "riddled with inherent conflicts" because the Department of Justice refused to say at the outset that it might not change its mind regarding the appropriateness of unitary status once the case commenced.

The Buffalo school district, relying on city school appropriations under New York's school finance law, filed suit against the city to obtain additional funds for desegregation programs. The district court monitoring the protracted dispute refused to order the funds, finding that the district had long failed to follow court instructions regarding the documentation the court needed to review the issue.[111] The board's financial statements were described as "voluminous, inconsistent, confusing, and misleading." The city also argued that the system had failed to follow state procedures for requesting an emergency appropriation. While a court-appointed accountant was able to make some sense out of the district's finances, the data were not sufficient to convince the court to order additional funds when the district books were in such disarray.

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[108] Stell v. Board of Pub. Educ., City of Savannah, 724 F. Supp. 1384 (S.D. Ga. 1988).

[109] Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82 (11th Cir. 1989).

[110] United States v. State, 702 F. Supp. 1577 (M.D. Ga. 1989).

[111] Arthur v. Nyquist, 716 F. Supp. 1484 (W.D.N.Y. 1989).

The Fifth Circuit approved a district court order ending busing to reduce segregation in the sprawling Fort Worth school district.[112] The school district is becoming increasingly populated by minority students, and the lengthy bus trips, averaging over an hour, had not proved successful in maintaining racial balance in the district. The appeals court was persuaded by data showing that fewer white students would leave the district if the busing were to be halted. At the program's termination, fewer than 2% of the district's students were bused.

Litigation involving desegregation in Fort Worth, spanning almost thirty years, shows promise of coming to a close. A district court reviewed the progress made toward desegregation, including data showing that the district spent more on minority students and had made impressive progress in achieving equality in staff hiring. Plaintiffs in the case also offered no concrete suggestions on further remedial actions that might be taken. The court concluded that the system was unitary and that it would be released from court supervision in three years.[113]

The Fifth Circuit affirmed a lower court decision finding that the Oxford, Mississippi, school district had achieved unitary status.[114] Plaintiffs in the case challenged the decision on the grounds that segregation still was apparent in several areas, including discipline, employment, and extracurricular activities. But the appeals court was unpersuaded, characterizing the plaintiffs' arguments as representing "preferences" regarding school policy rather than as evidence of continuing constitutional violations.

State Court Cases

Several state court cases reported in this section in recent years have focused on the powers of state civil rights commissions to investigate complaints arising in schools where a desegregation plan is in force. State courts have been less than enthusiastic about opening a second forum for desegregation cases beyond that already afforded by state courts, generally concluding that the jurisdiction of commissions as enumerated by state laws do not extend to desegregation disputes.

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[112] Flax v. Potts, 680 F. Supp. 820 (N.D. Tex. 1988), *aff'd*, 864 F.2d 1157 (5th Cir. 1989).

[113] Flax v. Potts, 725 F. Supp. 322 (N.D. Tex. 1989).

[114] Quarles v. Oxford Mun. Separate School Dist., 868 F.2d 750 (5th Cir. 1989).

In a 1989 state court case, a mother filed a human relations commission complaint alleging that her son had been discriminated against while attending a mostly white magnet school. A lower court ruled against the plaintiff on a technicality, holding that the complaint had not been filed within the required ninety days. An equally divided Pennsylvania Supreme Court allowed the lower court ruling to stand, thereby sidestepping the jurisdictional issue.[115]

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[115] Pennsylvania Human Relations Comm'n v. School Dist. of Philadelphia, 562 A.2d 313 (Pa. 1989).

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HANDICAPPED

Allan G. Osborne, Jr.

Introduction / 96
Entitlement to Services / 96
Procedural Safeguards / 98
    Change in Placement / 99
    Administrative Remedies / 100
    Standing to Sue / 102
    Statute of Limitations / 102
    Actions Under Other Statutes / 103
Placement / 103
    Appropriate Educational Program / 104
    Least Restrictive Environment / 104
    Private Facilities / 107
Related Services / 108
Discipline / 109
Remedies / 110
    Damages / 110
    Tuition Reimbursement / 111
    Attorneys Fees / 112
State Immunity / 114
Other EHA Issues / 115
State Laws / 116
Discrimination Under the Rehabilitation Act, Section 504 / 117
    Students / 117
    Employees / 119
        Discrimination Claims / 119
        Handicapped Persons / 120
        Otherwise Qualified Individuals / 120
        Reasonable Accommodation / 121
    Other Section 504 Issues / 122

INTRODUCTION

As in previous years, litigation over the rights of handicapped students and employees continued at a significant level. Since 1986 when Congress passed the Handicapped Children's Protection Act, providing for the recovery of attorneys fees and other legal costs by parents who prevailed in special education actions, that issue has been the subject of much of the litigation. Again in 1989 recovery of attorneys fees was the most frequently litigated handicapped issue.

The United States Supreme Court heard one handicapped education case in 1989. In *Dellmuth v. Muth*[1] the court settled a controversy that developed among the appeals circuits by declaring that Congress did not abrogate the states' eleventh amendment immunity when it passed the Education for All Handicapped Children Act (EHA).

ENTITLEMENT TO SERVICES

Although the EHA requires school districts to provide handicapped children with a free appropriate public education which consists of any needed special education and related services,[2] the Act does not establish any specific substantive standards by which a given program can be judged to be adequate. The Act states that the handicapped child is entitled to specially designed instruction[3] that conforms to the student's individualized education program (IEP).[4] The Supreme Court has held that the handicapped child is entitled to personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction provided.[5] Although the courts have been cautioned not to impose their views of preferable educational methods[6] on school districts, they are continuously asked to determine what level of service is required to meet the Act's minimum standards.

The Eleventh Circuit Court of Appeals vacated and remanded a Florida federal district court decision that had ordered a restricted placement within a special education classroom for a student with

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[1] 109 S. Ct. 2397 (1989).

[2] 20 U.S.C. § 1401(18).

[3] 20 U.S.C. § 1401(16).

[4] 20 U.S.C. § 1401(18)(d).

[5] Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).

[6] *Id.*

Acquired Immune Deficiency Syndrome (AIDS). The district court initially had denied a preliminary injunction to prevent the child's exclusion but later held that the proper placement for the child, who drooled and was incontinent, was a separate room to be constructed within the classroom. A full time aide was also ordered to attend to the child. In remanding the appeals court instructed the lower court to consider the intricate relationship between the EHA and section 504 of the Rehabilitation Act. On remand the district court determined that the appropriate placement for the student if she did not have AIDS would be the special classroom. Since recent medical evidence indicated that the risk of transmission of the disease from bodily secretions was statistically remote, the court ordered the school district to admit the student to the classroom.[7]

The First Circuit Court of Appeals held that a handicapped child does not have to be capable of benefitting from special education in order to be eligible for services under the EHA. The child in question was a severely multihandicapped student who had sought an appropriate educational placement when he reached school age. The school district refused to provide services claiming that he was so severely disabled that he could not benefit from them. Following lengthy due process proceedings the district court held that the school district was not obligated to provide the student with special education. The appeals court reversed stating that the language of the EHA was unequivocal that "all handicapped children" were to be served. The court found no exception for the severely handicapped and found no requirement that the child must demonstrate an ability to benefit from the educational program in order to be eligible for services. Furthermore, the court found that the term "education" as used in the EHA is to be broadly defined; encompassing a wide spectrum of training which could include basic life skills.[8]

A Pennsylvania federal district court held that handicapped students are entitled to educational facilities comparable to those provided to nonhandicapped students. The court also found that the failure to open classes for the handicapped was a violation of their rights to a free appropriate public education. The parties had stipulated that due to the failure of member school districts to provide an intermediate education unit with adequate space, handicapped students had been placed in substantially unequal facilities which were excessively segregated, programs for the handicapped often had been relocated to make way for classes for the nonhandicapped, and new classes were not allowed to operate due to a lack of space.[9]

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[7] Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988); *on rem'd* 711 F. Supp. 1066 (M.D. Fla. 1989). *See* Yearbook of Education Law 1989 at 96-7.

[8] Timothy W. v. Rochester, N.H. School Dist, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 519 (1989).

A federal district court in Virginia held that a handicapped student is not necessarily entitled to placement in the student's home school or the school the student would prefer to attend. The case involved a hearing impaired student who was placed in a centralized program within the district. The court held that in view of the limited resources available to a school district, establishment of a centralized program for students with low incidence type handicaps would better serve the interests of all students.[10]

PROCEDURAL SAFEGUARDS

One of the unique features of the EHA is that it contains a set of elaborate due process safeguards to ensure that handicapped children are properly identified, evaluated, and placed.[11] Under these provisions the parents of a handicapped child must be provided with the opportunity to participate in the development of an individualized education program for their child.[12] The EHA also requires school districts to obtain parental consent prior to evaluating the child or making an initial placement.[13] Once a handicapped child has been placed, the school district must provide the parents with proper notice before it may initiate a change in placement.[14]

If parents disagree with any of the decisions made by the school district they may request an impartial due process hearing.[15] Any party that is not satisfied with the final outcome of these administrative proceedings may appeal to the state or federal courts.[16] While an administrative or judicial proceeding is pending the school district may not change the child's placement without parental consent.[17]

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[9] Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989).
[10] Barnett v. Fairfax County School Bd., 721 F. Supp. 757 (E.D. Va. 1989).
[11] 20 U.S.C. § 1415.
[12] 34 C.F.R. § 300.345.
[13] 34 C.F.R. § 300.504(b).
[14] 20 U.S.C. § 1415(b)(1)(C).
[15] 20 U.S.C. § 1415(b)(2).
[16] 20 U.S.C. § 1415(e)(2).
[17] 20 U.S.C. § 1415(e)(3).

Change in Placement

The Court of Appeals for the District of Columbia Circuit heard three cases in 1989 dealing with EHA change in placement procedures. In the first case the court held that the private school a handicapped student had been attending for the past year was not the *status quo* since a hearing officer had ordered funding for that program for one year only. The student had been unilaterally placed in the private school by his parents while due process action was pending. The school district's IEP calling for a public school placement was determined to be appropriate but the hearing officer ordered the school district to fund the private school for one year due to procedural violations on the part of the school district. At the end of that year the school district again proposed a public school placement and the parents objected. The hearing officer's earlier decision that the proposed public school program was appropriate was reaffirmed. The appeals court held that the hearing officer's initial opinion clearly indicated that the private school placement was to be for one year only and that once the year ended that program ceased to be the current educational placement.[18]

In the second case the appeals court indicated that a handicapped child may remain in the then current placement only until the trial court proceedings are completed. The court held that the proceedings referred to in the EHA's *status quo* provision are administrative hearings and trial court actions. The court held that the *status quo* provision did not entitle the students in question to remain in a private school at public expense pending the review by the appeals court of a district court decision that upheld proposed public school placements.[19]

In the third case officials at the private school the student had been attending at public expense determined that the school could no longer provide him with an appropriate education. The school district proposed a public school placement but the parents rejected that offer and unilaterally enrolled the student in another private school. Although the hearing officer held that the proposed public school program was appropriate the district court held that the parents' chosen private school was the then current placement, reasoning that where the former program was private the interim program must also be private. The appeals court rejected that reasoning

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18. Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989).
19. Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989).

stating that a public school program is not inherently dissimilar to a private school program.[20]

In a case in which several of New York's state placement and review procedures were challenged, a federal district court held that the state's practice of terminating placements during the review process was a violation of the EHA.[21]

Administrative Remedies

Under the EHA's due process scheme the parties must exhaust all administrative remedies prior to filing court action unless it would be clearly futile to do so. In 1989 several federal courts refused to hear complaints because administrative remedies had not been exhausted.

The Sixth Circuit Court of Appeals dissolved a preliminary injunction issued by the district court to restrain enforcement of an athletic association's rule that barred a handicapped transfer student from participating in interscholastic sports for one year. The student had transferred because of his disability. The appeals court held that the state's established hearing procedures were adequate to provide the student with the relief sought. The court further held that the need for swift action may sometimes justify an exception to the exhaustion doctrine but not when the emergency was created by the parents' failure to request a hearing in a timely fashion.[22]

The Tenth Circuit Court of Appeals held that disciplinary actions, including short-term suspensions and time-out periods, are matters relating to the education of the child subject to the EHA's provisions. Therefore, parents must exhaust administrative remedies under the Act even if additional causes of action are brought under the Constitution or other statutes according to the court.[23]

The District of Columbia Court of Appeals held that although parents might be frustrated with the EHA's process they must still pursue all administrative remedies prior to seeking judicial review unless doing so would be futile or inadequate.[24] The First Circuit Court of Appeals also held that the EHA's comprehensive scheme requires the exhaustion of administrative remedies before recourse to the courts is permitted.[25] Neither court found justification for exemption from that doctrine. The Sixth Circuit Court of Appeals reversed a district court tuition reimbursement award for failure to exhaust after it determined that the district court should have remanded to the hearing officer.[26]

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[20] Knight v. District of Columbia, 877 F.2d 1025 (D.C. Cir. 1989).

[21] Louis M. v. Ambach, 714 F. Supp. 1276 (N.D.N.Y. 1989).

[22] Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989).

[23] Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989).

[24] Cox v. Jenkins, 878 F.2d 414 (D.C. Cir. 1989).

[25] Christopher W. v. Portsmouth School Comm., 877 F.2d 1089 (1st Cir. 1989).

Several of New York's administrative procedures were challenged in a class action suit. A federal district court held that the Commissioner of Education, as a state employee, was clearly not impartial as required by the EHA's due process provision. The court also found that the state's practice of remanding placement decisions for further proceedings contravened the EHA's intent to place handicapped children as quickly as possible and that evidence existed that there was a lack of parental involvement in the review process.[27]

The Supreme Court of New Hampshire upheld the state's review process for resolving inter-agency disputes. Under state law the Department of Education and the Department of Health and Human Services were jointly responsible for providing services to developmentally disabled individuals. The responsibilities of the two agencies overlapped and unfortunately handicapped students were sometimes denied services when each agency denied responsibility. Under legislative directive the Commissioners of both agencies developed a review procedure to resolve such disputes. The court held that this procedure did not violate the EHA since an aggrieved party was not required to follow it prior to appealing EHA administrative decisions to the courts.[28]

In a case where two students who attended a boarding school operated by the Bureau of Indian Affairs (BIA) sought attorneys fees under the Equal Access to Justice Act,[29] the Ninth Circuit Court of Appeals held that the EHA's due process mechanism did not apply to BIA schools. In a footnote the court stated that it did not need to consider the EHA claims of one of the students, who was handicapped, since the Secretary of the Interior, pursuant to the EHA, had established substantially equivalent review procedures that apply to BIA schools.[30]

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[26] Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989).

[27] Louis M. v. Ambach, 714 F. Supp. 1276 (N.D.N.Y. 1989).

[28] Guy J. v. Commissioner, N.H. Dep't of Educ., 565 A.2d 397 (N.H. 1989).

[29] 28 U.S.C. § 2412.

[30] Ramon v. Soto, 889 F.2d 891 (9th Cir. 1989), *withdrawn, reh'g granted.*

Standing to Sue

The Eleventh Circuit Court of Appeals held that a local education agency (LEA) is not allowed to bring a lawsuit seeking to compel a state to fulfill its statutory duties under the EHA. Several LEAs had filed suit claiming that the state of Georgia had failed to uphold its duties and that without state assistance they could not provide appropriate placements for severely handicapped students. The district court dismissed the suit and the appeals court affirmed. The appeals court added, however, that in an appropriate case challenging a student's IEP the LEA could defend itself by asserting that the state is primarily responsible for the EHA's implementation.[31]

The Fourth Circuit Court of Appeals held that a mentally retarded student had standing to sue to recover reimbursement for the partial depletion of health insurance benefits that had been used to pay for her education at a private residential facility. Under the terms of her health insurance policy she had a maximum lifetime benefit of $100,000 for the treatment of mental and nervous disorders. While she attended the residential facility the insurance company paid over $64,000 toward her tuition and other expenses. When she filed suit against the school district for reimbursement the district court held that she lacked standing to sue since it was her parents who suffered the injury. The appeals court reversed holding that she had standing to sue since the use of insurance benefits diminished her resources.[32]

Statute of Limitations

The EHA does not contain a statute of limitations for filing a lawsuit. Courts must, therefore, turn to applicable state statutes to determine whether a given lawsuit is timely. The District of Columbia Court of Appeals held that a suit under the EHA is similar to an administrative decision and thus, a local thirty day limitation on appeals of such decisions was applicable. However, since the school district had not notified the parents of this thirty day limitation the court held that the present suit was not time barred.[33] The Fourth Circuit Court of Appeals held that the state's three year statute of limitations did not begin until the student reached the age of majority due to her infancy and incompetency.[34]

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[31] Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989).

[32] Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989).

[33] Spiegler v. District of Columbia, 866 F.2d 461 (D.C. Cir. 1989).

Actions Under Other Statutes

When Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[35] it removed the restrictions and limitations the United States Supreme Court had placed on filing lawsuits under the Constitution and other federal statutes.[36] A lawsuit was filed in the federal district court in Connecticut against the state Board of Education claiming that the Board failed to make *bona fide* attempts to resolve complaints against a local school district and the Department of Children and Youth Services. The suit further claimed that the state failed to fully implement complaint resolution procedures as required by federal regulations in violation of the EHA, other federal statutes, and the fourteenth amendment. The district court dismissed all claims but the appeals court reversed and remanded.[37] On remand the district court held that a private right of action under section 1983 can be maintained for a claimed violation of the EHA.[38] However, a federal district court in Virginia held that a damage claim under section 1983[39] must be predicated on more than a reallegation of violations of the EHA.[40]

PLACEMENT

School districts are required to "insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services."[41] That continuum must range from placement within the regular classroom to a private residential facility and must also include homebound instruction. However, the placement chosen for any given handicapped student must be in the least restrictive environment appropriate for that child.[42] The placement must be made at public expense and must meet state educational standards.[43] Every placement must be reviewed at least annually.[44] The Supreme Court has held that an appropriate placement is one that is developed in compliance with the EHA's procedures and is reasonably calculated to enable the child to receive educational benefits.[45]

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[34] Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989).

[35] 20 U.S.C. § 1415(e)(4)(B) *et seq.*

[36] Smith v. Robinson, 468 U.S. 992 (1984).

[37] Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987). *See* Yearbook of Education Law 1988 at 113 and 131.

[38] Mrs. W. v. Tirozzi, 706 F. Supp. 164 (D. Conn. 1989).

[39] 42 U.S.C. § 1983.

[40] Barnett v. Fairfax County School Bd., 721 F. Supp. 755 (E.D. Va. 1989).

[41] 34 C.F.R. § 300.551(a).

[42] 34 C.F.R. § 300.550.

Appropriate Educational Program

A federal district court in California held that a student benefitted educationally from a public school program since a preponderance of the evidence indicated that he progressed in all areas. The student had been unilaterally removed from the public school program and enrolled in a private school by his parents. During the litigation his parents argued that he achieved better results at the private school. The court, however, held that his progress at the private school did not affect the appropriateness of the public school's offering since an appropriate program does not mean the best or one that has the most potential maximizing effect. The court stressed that the responsibility of picking between competing methodologies was left by the EHA to state and school officials.[46]

The Supreme Court of Virginia held that a public school program was appropriate since evidence indicated that the student had received benefit from that program in the past and would continue to do so. That evidence also indicated that the student's progress was comparable to that of other students in the program. The court further found that any lack of progress was due to factors unrelated to the program itself such as the student's tardiness, lack of motivation, and difficulty responding to parental authority.[47]

Least Restrictive Environment

The Fifth Circuit Court of Appeals established a two prong test for the lower courts to use in determining whether school districts have complied with the EHA's least restrictive environment provision. The case involved a six year old Down Syndrome child with an overall developmental level between two and three years. The school district had proposed a substantially separate special education placement with minimal mainstreaming. The parents preferred a program that included placement in a regular education classroom for at least half the school day. An independent hearing officer concluded that the regular education curriculum was beyond the student's abilities and that he would receive little educational benefit from regular class placement. Furthermore, the hearing officer found that meeting the child's needs would divert too much of the teacher's attention from the rest of the class. The district court and appeals court agreed.[48]

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[43] 20 U.S.C. § 1401(18).

[44] 34 C.F.R. § 300.552(a)(1).

[45] Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).

[46] Bertolucci v. San Carlos Elementary School Dist., 721 F. Supp. 1150 (N.D. Cal. 1989).

[47] School Bd. of Campbell County v. Beasley, 380 S.E.2d 884 (Va. 1989).

In upholding the school district's proposal the appeals court noted that

> [b]y creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs.[49]

The court found that for some children mainstreaming was not appropriate because placement in a regular education environment would not provide them with a free appropriate public education. To assist the lower courts in balancing the competing interests the Fifth Circuit Court turned to the language of the EHA to develop its two part test. The appeals court held that a court must first determine whether education in the regular classroom, with supplementary aids and services, can be achieved satisfactorily. If it cannot, and special education must be provided, the court must determine whether the school has mainstreamed the child the maximum extent appropriate.

In a 1988 case the Supreme Court of Idaho reached a somewhat different conclusion. This case also involved a severely handicapped student who had an assessed I.Q. of 37. Initially he attended a segregated public school classroom but his parents later enrolled him in a parochial school where he was placed in a regular education classroom. The parents requested that the school district provide a full time one-to-one aide. The school district refused but agreed to provide some related services. The state supreme court held that mainstreaming was an important factor to be considered in assessing an appropriate education and that by accepting federal funds the school district was obligated to accept mainstreaming to the maximum extent appropriate. The court stated that by arguing that its segregated classroom was appropriate the school district ignored the congressional intent that mainstreaming was preferred to a segregated setting, no matter how appropriate the segregated setting might be.[50]

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[48] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989).

[49] *Id.* at 1044.

The Second Circuit Court of Appeals also found that mainstreaming is not appropriate for some students. In ruling that the school district's proposed segregated placement for a hearing impaired student was appropriate, the court noted that there was no evidence to substantiate the parents' claim that the student's needs could be met in a mainstreamed environment.[51] In considering the proper balance between mainstreaming and an appropriate program the court noted that

> [w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students . . . . Under the Act, where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate.[52]

Using a similar rationale the Fourth Circuit Court of Appeals affirmed a district court ruling that an autistic student could not be satisfactorily educated in a regular classroom environment even with supplementary aids and services.[53]

A federal district court in Virginia found that the EHA's least restrictive environment mandate does not create an absolute duty, but rather, is only one of several components of an appropriate education. The court held that a school district was not required to place a hearing impaired student in that student's home school or the school the student would prefer to attend, but could place the student in a centralized program within the district.[54] However, a Pennsylvania federal district court held that the EHA's mainstreaming objective is thwarted when classes for the handicapped are unnecessarily segregated and isolated.[55] The Eleventh Circuit Court of Appeals in remanding a case concerning the proper placement for a handicapped student with AIDS instructed the lower court to re-member the least restrictive environment mandate in determining whether the student could be educated in a special education classroom rather than in an isolated cubicle constructed within the classroom.[56]

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[50] Thornock v. Boise Indep. School Dist. No. 1, 767 P.2d 1241 (Idaho 1988).

[51] Briggs v. Board of Educ. of Conn., 882 F.2d 688 (2d Cir. 1989).

[52] *Id.* at 692.

[53] Devries v. Fairfax County School Bd., 882 F.2d 876 (4th Cir. 1989).

[54] Barnett v. Fairfax County School Bd., 721 F. Supp. 757 (E.D. Va. 1989). *See* n.10 and accompanying text.

[55] Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989). *See* n.9 and accompanying text.

The administrative burden of educating a handicapped student in the regular classroom cannot overcome Congress' preference for mainstreaming according to a ruling by a federal district court in Ohio, unless there is evidence that the student would not benefit from mainstreaming, that the benefits of education in a segregated setting far outweigh the benefits of a mainstream setting, or that the child would be a disruptive influence in the mainstream. The court held that a proposed IEP was inappropriate since it failed to provide sufficient mainstreaming.[57]

Private Facilities

The Eleventh Circuit Court of Appeals affirmed a district court's order to provide an autistic and mentally retarded student with a residential placement. The court held that sufficient evidence existed to support the district court's finding that a proposed public school program did not provide the student with a basic floor of opportunity. The district court had found that the evidence indicated that the student would not progress without a residential placement.[58]

The District of Columbia Court of Appeals held that a public school program was appropriate even though the IEP was written in terms that related to a private school the student had been attending. The court noted that an IEP is not bound to one location and that the IEP in question could be fully implemented in the public school. Since the parents were unable to show that the proposed public school placement was inappropriate, the court upheld the district's proposal. The court also held that an erroneous placement letter indicating that private school funding would continue the following year did not preclude the public school placement since a corrective letter was sent out long before the start of the school year.[59]

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[56] Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988). *See* n.7 and accompanying text.

[57] Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989).

[58] Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir 1989). *See* Yearbook of Education Law 1988 at 117.

[59] Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989).

In a 1988 case a federal district court in New Jersey held that a residential placement was the least restrictive environment for a student with learning and emotional problems. In ordering the residential placement the court noted that state law required a placement in which the student could best achieve success in learning. In this case the court determined that the student's emotional problems could not be severed from the learning process so that a residential placement was required for learning to take place.[60] However, a state appeals court in Tennessee held that the placement of a student with learning and social difficulties in a private psychiatric facility was for medical and not educational purposes and therefore was not subject to public funding.[61]

RELATED SERVICES

The EHA mandates that handicapped students are to be provided with related or supportive services if such services are required to assist the students in benefitting from their special education.[62] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are for diagnostic or evaluative purposes. The Supreme Court has held that related services need to be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be provided.[63]

A federal district court in Michigan held that under the EHA a handicapped student is entitled to transportation and incidents thereto. The court affirmed a state level hearing officer's decision that a trained aide could be provided to assist a medically fragile student during transportation so that the student could receive special education services in a school setting rather than at home. The district court stated that the provision of an aide or even another health professional did not constitute an exempted medical service.[64]

The Sixth Circuit Court of Appeals affirmed a district court decision that the school district was not required to provide a handicapped student with transportation to a private school funded by her parents since her handicap did not require any special transportation needs. The court held that when a student is voluntarily enrolled in a private school the public school district is not required to provide a related service if that service is not designed to meet the student's unique needs.[65] A Florida state appeals court held that there is no legal requirement that a school district provide transportation for a handicapped student to a geographically distant facility when there is no evidence that the school district was not providing an appropriate education in a closer facility that the student had been attending.[66]

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[60] B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140 (D.N.J. 1988).

[61] Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989).

[62] 20 U.S.C. § 1401(17).

[63] Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

[64] Macomb County Intermediate School Dist. v. Joshua S., 715 F. Supp. 824 (E.D. Mich. 1989).

A state appellate court in Tennessee held that payment for the services rendered by a psychiatrist are expressly excluded by the EHA since they are medical services. In this instance they were not being provided for diagnostic or evaluative purposes but were associated with a placement in a private psychiatric facility.[67]

DISCIPLINE

Although the EHA does not contain any mandates that specifically refer to discipline, disciplinary sanctions as applied to handicapped students have been the issue in numerous cases. However, several of the EHA's provisions, such as the change in placement procedures and *status quo* provision,[68] apply to the disciplinary process. The Supreme Court has emphatically stated that handicapped students cannot be expelled for disciplinary reasons, where the related behavior was a manifestation of the handicap.[69] They may, however, be temporarily suspended and are subject to other normal disciplinary sanctions.

The Supreme Court's 1988 decision appears to have settled much of the controversy surrounding the discipline of handicapped students as only one case has been reported since then. The Tenth Circuit Court of Appeals held that short-term disciplinary measures, such as in-school suspensions and temporary placement in a time-out room, did not amount to a change in placement. However, the court held that these sanctions constituted a matter relating to the education of the child and thus fell within the scope of the EHA. The case was reversed and remanded because the parents had not exhausted administrative remedies prior to filing suit.[70]

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[65] McNair v. Oak Hills Local School Dist., 872 F.2d 153 (6th Cir. 1989). *See* Yearbook of Education Law 1988 at 120.

[66] School Bd. of Pinellas County v. Smith, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989).

[67] Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 771 S.W.2d 427 (Tenn. Ct. App. 1989).

[68] *See* nn.14 & 17 and accompanying text.

[69] Honig v. Doe, 484 U.S. 305 (1988). *See* Yearbook of Education Law 1989 at 110-11.

REMEDIES

If a school district fails to provide a handicapped student with an appropriate placement the courts are empowered to "grant such relief as the court determines is appropriate."[71] Often the relief granted involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. According to the Supreme Court school districts are required to reimburse parents for any unilaterally obtained private schooling if they prevail in having their chosen placement determined to be appropriate.[72] Awards of compensatory educational services have been made in situations where the parents did not have the means to obtain the necessary services while litigation was pending.

Congress amended the EHA in 1986 with the Handicapped Children's Protection Act (HCPA)[73] which allows parents who prevail in an EHA suit against the school district to recover their legal expenses. Since then the reimbursement of attorneys fees has been the most frequently litigated issue under the EHA.[74]

Damages

A federal district court in Virginia denied an award of monetary damages for mental and emotional distress allegedly suffered by a hearing impaired student because he was required to attend a school other than his home school in order to receive a free appropriate public education. The court stated that it has clearly been established that, except for tuition reimbursement, compensatory damages are not recoverable under the EHA. The court further indicated that a damage claim under another federal statute would have to be predicated on more than a reallegation of EHA violations.[75]

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[70] Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989). *See* n.23 and accompanying text.

[71] 20 U.S.C. § 1415(e)(2)(C) *et seq.*

[72] Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

[73] 20 U.S.C. § 1415(e)(4)(B) *et seq.*

[74] *See* Yearbook of Education Law 1988 at 108-109 and Yearbook of Education Law 1989 at 95-96.

Tuition Reimbursement

The Eleventh Circuit Court of Appeals affirmed a lower court decision that the parents of an autistic student were entitled to be reimbursed for some of the costs of a unilaterally obtained residential school placement since sufficient evidence existed to support the finding that the school district's proposed program did not provide the student with a basic floor of educational opportunity.[76] Two courts awarded tuition reimbursement after it had been shown that the school district failed to provide a free appropriate public education in the least restrictive environment. One of those courts indicated that the parents' failure to consult with school officials regarding their choice of an alternative placement did not deprive them of their right to reimbursement since the IEP was presented only ten days prior to the start of the school year and the school district had indicated that it would not consider further mainstreaming.[77] The other court awarded reimbursement of tuition at a parochial school stating that the school district's failure to offer an appropriate education, which included substantial mainstreaming, gave the student's parents justification for the parochial school placement.[78]

Tuition reimbursement was awarded by the New Jersey Supreme Court after it found that the school district's proposed IEP was inappropriate since it was drafted in such a fashion that the student's progress could not be measured. The court denied reimbursement for room and board, however, because it found that placement in a boarding school was not necessary.[79] The Sixth Circuit Court of Appeals held that the parents of a handicapped child did not waive their right to seek tuition reimbursement by placing their child in a private school without school district approval.[80]

The Second Circuit Court of Appeals held that parents cannot be reimbursed for unilateral placements that are made in facilities that are not approved by the state since such placements cannot be considered to be proper under the EHA because they do not meet state standards as required by the Act.[81] A New Jersey federal district court also denied tuition reimbursement for an out-of-state behavioral program that was not on the state's list of approved educational facilities. The court further found that the behavioral program could not be considered a related service since it was isolated from and incongruent with any educational experience.[82] However, the Supreme Judicial Court of Massachusetts held that reimbursement was required if the parents chosen facility was appropriate even if it was not on the state's approved list. The Massachusetts court held that if the parents and the school district agreed to a non-approved placement there was nothing to prevent them from seeking state approval for that placement.[83]

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[75] Barnett v. Fairfax County School Bd., 721 F. Supp. 755 (E.D. Va. 1989). *See* n.40 and accompanying text.

[76] Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989).

[77] Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989).

[78] Thornock v. Boise Indep. School Dist. No. 1, 767 P.2d 1241 (Idaho 1988).

[79] Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist., 560 A.2d 1180 (N.J. 1989).

[80] Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989).

Under the Supreme Court's *Burlington* ruling tuition reimbursement is not appropriate if the school district offered and had the capacity to provide a free appropriate public education. The District of Columbia Court of Appeals denied reimbursement in two cases where it had been shown that the school district's proposed placement was appropriate.[84]

Attorneys Fees

Most of the attorneys fees litigation in 1989 involved the question of whether reimbursement of legal expenses was authorized by the HCPA when the dispute between the parents and school district was settled at the administrative hearing level. The courts are split on this issue with the majority holding that attorneys fees reimbursement is available for legal work completed at the administrative level.

The Eleventh Circuit Court of Appeals held that the term "any action or proceeding" in the HCPA includes administrative hearings and appeals.[85] The federal district court in Massachusetts also found that the plain language of the statute indicated that Congress intended for those who were successful at the administrative level to recover their legal costs.[86] The Fifth Circuit Court of Appeals found that the legislative history of the HCPA reflected Congress' unequivocal intent to award attorneys fees to parents for representation at administrative hearings.[87] That same court also held that services rendered in anticipation of a hearing fall within the HCPA's authorization to award attorneys fees for services connected with an administrative hearing even when the proceedings do not reach the hearing stage.[88] The Ninth Circuit Court of Appeals joined the majority of other circuits in holding that prevailing parents may recover attorneys fees, costs, and other expenses incurred in administrative proceedings.[89]

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[81] Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563 (2d Cir. 1989).

[82] B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1158 (D.N.J. 1988).

[83] Carrington v. Commissioner of Educ., 535 N.E.2d 212 (Mass. 1989).

[84] Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989); Knight v. District of Columbia, 877 F.2d 1025 (D.C. Cir. 1989).

[85] Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989). *Cf.* Drew P. v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989).

[86] Williams v. Boston School Comm., 709 F. Supp. 27 (D. Mass. 1989).

However, the Court of Appeals for the District of Columbia held that the district court did not have the authority to award attorneys fees to prevailing parents at the administrative level who filed a lawsuit solely to recover those fees. The appeals court found that the language Congress used in the HCPA provided for an award of attorneys fees only in cases where the losing party in administrative hearings appealed to the courts and prevailed in judicial action. The court also found that the legislative history of the HCPA did not reflect a clearly stated intention to the contrary that would allow a court to depart from the statutory language.[90]

Other litigation has involved the question of what constitutes a prevailing party under the HCPA. The federal district court in Rhode Island held that the parents of a handicapped child were the prevailing party since they succeeded on a significant issue and obtained their objective.[91] The New Hampshire federal district court also held that the parents were the prevailing party since they succeeded on a significant issue.[92] The Eleventh Circuit Court of Appeals held that the parents were the prevailing party since they achieved the most significant relief sought — a free appropriate public education.[93]

One provision in the HCPA indicates that recovery of attorneys fees is not available to parents for legal work completed after an offer of settlement is made by the school district if the final relief obtained is not more favorable than the school district's previous offer.[94] A federal district court in Tennessee denied a motion for attorneys fees since the school district had made a settlement offer prior to a due process hearing that was substantially similar to the final relief obtained by the parents.[95]

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[87] Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988).

[88] Shelly C. v. Venus Indep. School Dist., 878 F.2d 862 (5th Cir. 1989). *Cf.* Mr. D. v. Glocester School Comm., 711 F. Supp. 66 (D.R.I. 1989).

[89] McSomebodies (No. 1) v. Burlingame Elementary School Dist., 886 F.2d 1558 (9th Cir. 1989); McSomebodies (No. 2) v. San Mateo City School Dist., 886 F.2d 1559 (9th Cir. 1989).

[90] Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989).

[91] Mr. D. v. Glocester School Comm., 711 F. Supp. 66 (D.R.I. 1989).

[92] James v. Nashua School Dist., 720 F. Supp. 1053 (D.N.H. 1989).

[93] Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989).

[94] 20 U.S.C. § 1415(e)(4)(D).

The Eleventh Circuit Court of Appeals also held that the fact that the parents had not paid any attorneys fees was irrelevant to an award being made. The court stated that the right to attorneys fees did not depend on the parents' financial status or the availability of free legal assistance.[96]

STATE IMMUNITY

The eleventh amendment to the Constitution protects the states from lawsuits in the federal courts. However, Congress may abrogate the states' eleventh amendment immunity when it enacts legislation if it makes its intention to do so known in clear and unmistakable language within the statute itself.[97]

Controversy had arisen among the federal circuits as to whether Congress had specifically abrogated the states' eleventh amendment immunity when it passed the EHA.[98] In *Dellmuth v. Muth*[99] the Supreme Court held that Congress had not done so. In its ruling the Court relied on its *Atascadero* decision but added that the "clear and unmistakable language" must be both unequivocal and textual. The Court specifically rejected the approach used by the Third Circuit Court of Appeals of turning to the EHA's legislative history to determine Congress' intent.[100] The Court reasoned that if the language of the statute was unmistakably clear then recourse to the legislative history was not necessary and if the language was not unmistakably clear then the *Atascadero* rule had not been met. The Court found that the EHA did not mention either the eleventh amendment or sovereign immunity and thus did not demonstrate Congress' intent to abrogate eleventh amendment immunity with unmistakable clarity.

The Court also vacated and remanded an appeal from the Second Circuit for further consideration in light of its *Dellmuth* decision.[101] On remand the appeals court reaffirmed its prior holding that a student was entitled to compensatory educational services at a state operated institute for the blind. The court held that its previous decision was not based on abrogation of eleventh amendment immunity but was reached after it had concluded that the awarding of compensatory services would not violate the eleventh amendment. After considering *Dellmuth,* the court continued to believe that awarding compensatory services did not violate the eleventh amendment since such an award is prospective in nature.[102]

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[95] Hyden v. Board of Educ. of Wilson County, 714 F. Supp. 290 (M.D. Tenn. 1989).
[96] Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989).
[97] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
[98] *See* Yearbook of Education Law 1989 at 109.
[99] 109 S. Ct. 2397 (1989).
[100] Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988).

OTHER EHA ISSUES

A federal district court in Pennsylvania held that the EHA specifically stated that a private insurance carrier was not relieved of its obligation to pay for services to a handicapped child. The insurance company had refused to pay for special education services for a student injured in an automobile accident claiming that the state and the local school district were required to provide the needed services. The court also held that the insurance company did not have standing to sue because only a student seeking special education services could invoke the EHA.[103]

The Fifth Circuit Court of Appeals affirmed a United States Education Department finding that EHA funds had been misapplied by the state education agency and an order that $700,000 be refunded. In Louisiana the state Board of Elementary and Secondary Education (BESE) and the Superintendent of Education exercise common jurisdiction over education in the state. They had jointly applied for funds under the EHA and the funds were disbursed by the Superintendent. However, the BESE objected to the Superintendent's spending of the funds and notified the Education Department of its concerns which led to an audit and the ultimate refund order. BESE objected to that order since it had not received the funds; however, the appeals court held that BESE was the recipient and the party responsible for overseeing the expenditure of the funds.[104]

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[101] Burr v. Ambach, 109 S. Ct. 3209 (1989). *See* Yearbook of Education Law 1989 at 112.

[102] Burr v. Sobol, 888 F.2d 258 (2d Cir. 1989).

[103] Gehman v. Prudential Property and Casualty Ins. Co., 702 F. Supp. 1192 (E.D. Pa. 1989).

[104] Louisiana State Bd. of Elementary and Secondary Educ. v. United States Dep't of Educ., 881 F.2d 204 (5th Cir. 1989).

STATE LAWS

A state court in New York held that a request for residential school tuition reimbursement for the summer months was timely under state law since it was filed before the close of the school year to which it pertained.[105] A New York City criminal court held that under state law a victim's special education records were confidential and thus privileged. Since the defendant had not made a showing that the records would be relevant or material the court held that he was not entitled to examine them.[106]

A Pennsylvania court held that the state statutes did not preclude the state education agency from considering fiscal constraints as a factor when it made a decision to disapprove an intermediate unit's plan and budget. The court found that the agency must consider the reality of fiscal allocations when enough money has not been allocated to allow intermediate units and school districts to implement every program they wished.[107]

Pursuant to Missouri law the parents of two handicapped students appealed a school district's proposed IEPs. While the appeals were pending the school district drafted new IEPs calling for services at a vocational school. The vocational school did not agree to the plans and the trial court added it as a party to the lawsuit. The appellate court held that the trial court lacked authority to add the vocational school to the proceedings since it had not been afforded notice and a hearing prior to the order.[108]

The Supreme Court of Rhode Island held that children who resided in a private nonprofit residential school for dependent and neglected children were entitled to access to speech therapy services in the public schools. The controversy centered on whether the residential school was a "closed facility" under state law. The court held that it was not since the children were not unable to leave the facility. Since it was not a closed facility the children were entitled to access services in the public schools even on a part-time basis.[109]

The West Virginia Supreme Court of Appeals supported a Human Rights Commission's finding of discrimination against the school district for failing to provide two hearing impaired students with an appropriate education in the least restrictive environment. The court also awarded compensatory services until age twenty-four for one student as well as incidental damages for emotional distress to both students.[110]

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[105] *In re* Savio, 537 N.Y.S.2d 262 (App. Div. 1989).

[106] People v. Manzanillo, 546 N.Y.S.2d 954 (Crim. Ct. 1989).

[107] Lincoln Intermediate Unit No. 12 v. Commonwealth, 553 A.2d 1020 (Pa. Commw. Ct. 1989).

[108] State *ex rel.* Clinton Area Vocational School v. Dandurand, 766 S.W.2d 169 (Mo. Ct. App. 1989).

[109] *In re* Children Residing at St. Aloysius Home, 556 A.2d 552 (R.I. 1989).

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[111] Section 504 effectively prohibits any recipient of federal funds from discriminating against handicapped persons in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools. For that reason this section includes cases that may not have arisen in an educational context but are still applicable to educational programs that receive federal funds.

Students

A federal district court held that the failure of the Pennsylvania Secretary of Education to ensure that educational facilities for the handicapped were comparable to those provided to nonhandicapped students violated section 504. The court also held that the failure of member school districts to provide adequate space to an intermediate educational unit, which resulted in the relocation of special education classes to make room for regular education classes, and a failure to open needed new classes for the handicapped, violated section 504.[112]

The Eleventh Circuit Court of Appeals noted that the relationship between the EHA and section 504 is very intricate in remanding a case concerning a handicapped student with AIDS. The appeals court instructed the lower court to first determine the most appropriate educational placement for the child and then determine if the child otherwise qualified to be educated in that setting despite having AIDS. If not, the lower court was instructed to determine whether reasonable accommodations would reduce the risk of transmission of AIDS.[113] On remand the district court ordered the school district to admit the student to the special education class.[114]

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[110] Board of Educ. of County of Lewis v. West Virginia Human Rights Comm., 385 S.E.2d 637 (W. Va. 1989).

[111] 29 U.S.C. § 794.

[112] Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D Pa. 1989). *See* nn.9 & 55 and accompanying text.

The Eighth Circuit Court of Appeals upheld a district court decision that a multihandicapped carrier of hepatitis B was a handicapped person within the meaning of section 504 and had been denied admission to a residential rehabilitation facility because he was a carrier. However, the appeals court found that the lower court had erred in determining that the facility could reasonably accommodate him by inoculating those staff members who would come in contact with him. The appeals court stated that the lower court had underestimated the costs involved in implementing its order and the administrative burden of monitoring the process. The court also found that the limited inoculation plan approved by the district court would expose the staff to excessive risk. The lower court's decision was reversed and remanded.[115]

In a lawsuit involving the appropriate placement of a hearing impaired student under the EHA a Virginia federal district court held that section 504 does not create any tort liability for educational malpractice. Before any claim could be brought, according to the court, bad faith or intentional discrimination would have to be shown. The court found that compliance with the EHA established compliance with section 504 and that the student had not been discriminated against on the basis of his handicap since he had not been denied the opportunity to participate in any program.[116]

A federal district court in New York held that a school district must provide a sign language interpreter for certain school functions to the hearing impaired parents of nonhearing impaired students. The court found that the parents were otherwise qualified and were entitled to meaningful access to school initiated conferences incident to their children's education. Meaningful access requires more than accommodation of a privately obtained interpreter according to the court.[117]

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[113] Martinez v. School Bd. of Hillsborough County, Fla., 861 F.2d 1502 (11th Cir. 1988).

[114] Martinez v. School Bd. of Hillsborough County, Fla., 711 F. Supp. 1066 (M.D. Fla. 1989). *See* n.7 and accompanying text.

[115] Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989).

[116] Barnett v. Fairfax County School Bd., 721 F. Supp. 755, 721 F. Supp. 757 (E.D. Va. 1989).

[117] Rothschild v. Grottenthaler, 716 F. Supp. 796, 725 F. Supp. 776 (S.D.N.Y. 1989).

The Second Circuit Court of Appeals held that the imposition of an additional housing fee on a wheelchair bound student did not violate section 504. The student requested and received single occupancy of a double room at a university. For the first year he was charged only for a single room but after that he was charged double. After graduation he continued at the university as a graduate student and, at his own request, retained his undergraduate housing unit. The court found that since the student had never applied for accessible housing, such housing was never denied. Also since he had requested the room he had been given, he failed to show a violation of section 504.[118]

Employees

Discrimination Claims. An applicant for a postal service position filed suit after being denied employment due to a history of on-the-job violence and belligerent behavior toward postal officials after he had failed to secure positions in the past. The Sixth Circuit Court of Appeals denied his discrimination claims holding that he was not a handicapped person under section 504 because he failed to show that his asthma substantially limited major life activities and that he failed to produce any evidence that his application was denied solely because of a handicap.[119] A New York federal district court dismissed the claims of a sanitation department employee who had been fired because of positive drug tests indicating heroin use.[120]

The District Court for the District of Columbia held that an alcoholic treasury department employee, who had been dismissed after failing to provide requested medical documentation for frequent absences, failed to support his claim of discrimination since the reason for his dismissal, failure to provide the medical documentation, had nothing to do with his alcoholism. Also, since the department was unaware of the former employee's alcoholism, it was not required to provide him with the protections that must be provided to known alcoholics under the Rehabilitation Act.[121]

A Louisiana federal district court also upheld the dismissal of a licensed practical nurse who had been dismissed after refusing to provide requested medical information. The hospital had requested this information after it became apparent that the nurse had a high medical risk of having an infectious disease. The court held that the nurse had been fired because he failed to comply with hospital policy and not because he was perceived to be handicapped. The court also held that his failure to comply with the hospital's legitimate request rendered him not otherwise qualified to perform his job.[122]

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[118] Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989).

[119] Harris v. Adams, 873 F.2d 929 (6th Cir. 1989).

[120] Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264 (S.D.N.Y. 1989).

[121] Fong v. United States Dep't of Treasury, 705 F. Supp. 41 (D.D.C. 1989).

The Commonwealth Court of Pennsylvania upheld the section 504 claims of bus drivers who had their licenses revoked for medical reasons. The cases involved drivers who had experienced heart attacks or epileptic seizures. The court held that once it had been established that a chronic medical condition existed, the drivers could rely on section 504 as an affirmative defense and that the burden was on the Department of Transportation to prove the drivers could not safely operate their buses.[123]

Handicapped Persons. In order to be considered a handicapped person under the section 504 regulations, a claimant must have an impairment which substantially limits one or more major life activities, have a record of such an impairment, or be regarded as having such an impairment.[124] The Sixth Circuit Court of Appeals held that an applicant for a postal position was not a handicapped person because his asthma did not substantially limit his life activities.[125] The Ninth Circuit Court of Appeals held that a worker who had been dismissed from the Corps of Engineers after an x-ray revealed a spinal deformity, was handicapped because he was so regarded by the Corps.[126]

Otherwise Qualified Individuals. The Supreme Court has held that an otherwise qualified person is an individual who can meet all of the employment requirements in spite of the handicap.[127] An employee of the Department of Agriculture who suffered from a mental disorder that caused anxiety over travel and a propensity to shoplift was dismissed because of convictions of shoplifting and other acts of dishonesty. The federal district court in Maryland held he was not otherwise qualified because he could not perform the prerequisites of his job. The court noted that handicapped discrimination laws protect only those who can perform their jobs in spite of their handicap.[128]

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[122] Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989).

[123] Commonwealth v. Brown, 558 A.2d 121 (Pa. Commw. Ct. 1989); Commonwealth v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989).

[124] 34 C.F.R. § 140.1(j).

[125] Harris v. Adams, 873 F.2d 929 (6th Cir. 1989).

[126] Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989).

[127] Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[128] Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988).

A New York federal district court held that in order to be considered otherwise qualified a handicapped person was required to demonstrate that he could perform the essential functions of the job. The court further held that an employer was allowed to consider potential safety risks to other employees in making an employment decision.[129] Similarly, the federal district court in the District of Columbia upheld the firing of a federal agency employee who physically assaulted a female supervisor, ruling that the employee was not otherwise qualified because he could not perform his duties without endangering the health and safety of himself or others.[130]

Reasonable Accommodation. Under section 504 regulations employers are required to make reasonable accommodations for handicapped employees unless doing so would impose an undue hardship on the operation of the program.[131] The Fourth Circuit Court of Appeals held that the following procedures must be followed by government agencies in dealing with alcoholic employees: (1) inform the employee of available counseling, (2) provide the employee with a firm choice between treatment and discipline, (3) permit the employee to participate in outpatient treatment, (4) permit the employee to participate in an inpatient program, if necessary, and (5) dismiss the employee.[132]

An Illinois federal district court held that reasonable accommodations could be made for a deaf postal employee who sought a promotional position. The court held that a requirement that the employee be able to hear conversational speech was overbroad and discriminatory because that ability was not a business necessity. Furthermore, a requirement that the employee answer the telephone was not an essential function of the position.[133] A Pennsylvania state court held that monitoring a diabetic's ability to operate a school bus on a daily basis would not place an undue burden on her employer.[134]

However, reasonable accommodation does not require an agency to indulge a propensity for violence even if it is caused by a handicap according to the District of Columbia District Court.[135] Also, an employer is not required to materially change its job description or lower its standards when the handicap relates to reasonable criteria for employability according to a ruling by a New York federal district court.[136]

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[129] Serrapica v. City of N.Y., 708 F. Supp. 64 (S.D.N.Y. 1989).

[130] Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

[131] 34 C.F.R. § 104.12.

[132] Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).

[133] Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989).

[134] Commonwealth v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).

[135] Adams. v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

Other Section 504 Issues

The Fourth Circuit Court of Appeals held that in order for a handicapped child's attorneys to receive a fee award under section 504 they must be able to show that the lawsuit contributed in a significant way to obtaining the relief sought. Since the court found that filing of the lawsuit in question did not contribute to the readmission of a child with AIDS to school that requested fee award was denied.[137] An Illinois state court also denied an award of attorneys fees because the students had been unable to establish that they were denied a free education solely on the basis of their handicap. The students, who had been placed in a private residential center for the treatment of drug and alcohol abuse, had been charged tuition to attend the local public schools because of their nonresident status.[138]

The Eleventh Circuit Court of Appeals held that appellants, administrators of county special education programs and the Georgia Department of Education, were required to exhaust administrative appeals prior to bringing a suit in the federal courts. The Office of Civil Rights (OCR) had initiated investigations of the special education programs in response to parental complaints. When the administrators of the programs refused to cooperate in the investigations OCR started proceedings to terminate federal funds. The state and counties filed suit claiming that OCR was acting beyond its jurisdiction in investigating complaints about the special education programs. The district court dismissed for failure to exhaust administrative appeals. The appeals court affirmed the decision holding that the appellants had failed to demonstrate that they would be irreparably injured by the requirement to exhaust, that the appellants had not shown that OCR was plainly without jurisdiction, and that the agency's expertise in this matter would greatly aid a reviewing court.[139]

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136. Serrapica v. City of N.Y., 708 F. Supp. 64 (S.D.N.Y. 1989).
137. Child v. Spillane, 866 F.2d 691 (4th Cir. 1989).
138. Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989).
139. Rogers v. Bennett, 873 F.2d 1387 (11th Cir. 1989).

5

TORTS

William J. Evans, Jr.

- Introduction / 123
- Negligence / 124
  - Injuries / 124
    - Off School Property and After School Hours / 124
    - School Settings During School Hours / 125
    - En route to and from School / 129
    - School Buildings and Grounds / 130
    - School-related Activities / 132
- Negligence Defenses / 132
  - Immunity / 132
    - Common Law (Governmental Immunity) / 133
    - Statutory Immunity / 136
  - Other Defenses / 138
    - Notice of Claim / 138
    - Comparative Negligence / 140
- Liability Insurance / 141
- Attorney Fees / 143
- Employee Injuries/Workers' Compensation / 144
- Defamation / 146
- Intentional Infliction of Emotional Distress / 147
- Tortious Interference with a Contract / 147
- Product Liability / 147
- Construction Contracts / 149
- Constitutional Torts / 152
  - Student Initiated Cases / 152
  - Employee Initiated Cases / 154

INTRODUCTION

The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. State laws provide the basis for most actions, which are predicated on the principle that individuals are responsible for the consequences of their conduct.[1] The major categories into which tort actions can be grouped are: negligence, which involves conduct which falls below an acceptable standard of care; intentional torts, where actions are committed with a desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.

This chapter will examine those cases reported during 1989 which involved tort claims within the school context. Included are cases involving school officials, school employees, students, and in some instances others visiting school grounds. Torts arising out of interscholastic sport participation are not included as they are discussed in chapter six.

NEGLIGENCE

Negligence is established when one's actions fall below a standard of care expected of a reasonable person and the result is an injury. There must be a causal relationship between the alleged negligent conduct and the injury sustained. The behavior expected of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. Against that standard, a court will determine whether liability may be imposed. Questions of law are determined by judges, while questions of fact are decided by juries.

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students, and in some cases adults, resulted in a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. A Montana high school cheerleader was injured while participating in a privately sponsored summer cheerleading clinic, the funds for which were raised by the girls themselves. Following an unsuccessful action against the school district, the student appealed.[2] The court held that the district could not be held responsible for the girl's injuries merely because the school provided a bus for her transportation. The cheerleading advisor, who had attended the clinic at her own expense, was not seen as an agent of the school thus making the district liable.

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[1] *See generally* W. Prosser, Law of Torts (4th ed. 1971).

[2] Rollins v. Blair, 767 P.2d 328 (Mont. 1989).

A junior high school student, who was allegedly sexually molested by his mathematics teacher, brought an action against his California school district and teacher.[3] The student enrolled in a work-experience program which included helping the teacher correct papers in the teacher's apartment. The court found that the school district could not be held vicariously liable for the alleged molestation which took place in the apartment while the student was under the supervision of the teacher.

The parents of an eleven-year-old Indiana special education student brought a suit for damages following her alleged sexual abuse. The incident took place while the student was on a class outing during a time when the girl was unsupervised. The teacher had allowed the girl and three male classmates to leave her supervision and walk to a nearby nature center to wash their hands. The court saw the teacher's action as an exercise of professional judgment, not a policy decision which would be protected from liability.[4] However, a lack of immunity was not found to have made the teacher and her school liable. The possibility of unreasonable supervision was to be left for trial.

School Settings During School Hours. Two cases involved student injuries during physical education class. The mother of an Illinois student brought an action against the school board, board of trustees, and county educational services region.[5] Her daughter had been injured when required to climb a rope ladder in physical education class. The action against the education services region was dismissed as the court found that entity not to have any duties or a corporate identity which would allow it to sue or be sued. The provision of equipment by the school board was determined to be a discretionary act for which the board could not be held liable. However, sufficient facts were alleged to state a claim for willful and wanton misconduct. It was to be a matter for trial whether alleged inadequate supervision, inadequate equipment, and improper instruction support such a cause of action.

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[3] John R. v. Oakland Unified School Dist., 256 Cal. Rptr. 766 (1989).

[4] Borne v. Northwest Allen County School Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989).

[5] Bowers v. Du Page County Regional Bd. of School Trustees Dist. No. 4, 539 N.E.2d 246 (Ill. App. Ct. 1989). *See* Buckvar v. Syosset Cent. School Dist., 538 N.Y.S.2d 563 (App. Div. 1989). No rational basis was found to hold a school district negligent for injuries sustained by students who collided during a flag football game.

An action for negligent supervision was brought against two physical education teachers after an Alabama eighth-grade student broke his elbow when he slipped on a puddle of water while playing basketball.[6] Summary judgment was granted to the teachers as all the evidence showed that the teachers had exercised reasonable and proper supervision over their students. Both teachers had been teaching at the school only a few weeks, and neither was aware of a tendency for roof vents to leak water on the gym floor. In addition, neither the teacher nor any students had been aware of the wet condition prior to the accident.

A North Carolina student appealed an order of the Industrial Commission which held that his shop teacher was not negligent in connection with injuries the student sustained during class.[7] The student, who was deaf, injured his eyes while trying to add oil to a hydraulic lift. In affirming the decision, the court found that the teacher did not owe the student a greater duty of care due to the student's deafness. Rather, the standard of care was that of ordinary prudence given the situation of the student's handicap. The teacher had instructed the student on the rules of safety, one of which was to leave alone those things which did not pertain to what he was doing. This warning was found to have adequately instructed the student about any potential dangers that might result from his attempt to add oil to the lift.

A Michigan high school teacher attempted to pull back the chair of a student in order to discipline him. Unknown to both the student and teacher, three of four fasteners holding the seat to the frame were missing causing the student to fall to the floor and sustain injury. The student failed in his suit against the teacher as the court found no cause of action for simple negligence.[8] The teacher was found to have been attempting to maintain proper discipline, and not grossly abusive with a disregard for the health and safety of the student.

Approximately two years after a thirteen-year-old student had been administered corporal punishment he was diagnosed as suffering from post-traumatic stress disorder. His parents brought suit against the school district seeking recovery for the psychological and physical injuries sustained by their son.[9] The court, while not specifically addressing the psychological aspect of the student's injuries, held that the three "licks" the student received were not so severe as to be in violation of Georgia state law or school board rules.

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[6] Best v. Houtz, 541 So. 2d 8 (Ala. 1989).

[7] Payne v. Department of Human Resources, 382 S.E.2d 449 (N.C. Ct. App. 1989).

[8] Atkinson v. DeBraber, 446 N.W.2d 637 (Mich. Ct. App. 1989).

[9] Mathis v. Berrien County School Dist., 378 S.E.2d 505 (Ga. Ct. App. 1989).

A twelve-year-old New York student was escorted from her fifth floor art classroom to her third floor social studies classroom by her social studies teacher. When she had completed her work, the teacher directed her to return to the art class. En route the girl was accosted by three students and raped. The student's mother brought an action against the board of education for breach of a special duty and negligent supervision.[10] Following the trial court's summary judgment dismissing the complaint, the mother sought appeal. The appellate court found material issues of fact relating to the school's actions. While the school was not found to have a special duty to the student, it was expected that the standard of care and supervision over pupils would be such as that of a reasonably prudent parent. In a school where two aides and two security guards were assigned to each floor, the teacher's actions were not found to have met that standard. While recognizing that a school is not the insurer of student safety, it was held liable in damages for a foreseeable injury proximately related to an absence of supervision.

A personal injury action was brought on behalf of a student at a Louisiana school for the mild and moderately retarded.[11] While walking toward the bus which was to take him home, another student pulled his arm and then struck him in the jaw. His action against the school board and state resulted in a directed verdict for the defendants. The appellate court affirmed the decision finding the incident unforeseeable in nature, and therefore unavoidable. The foster child status of the student was not found to impose upon the state or school board strict liability for the acts of minor children.

A high school senior brought suit against a New York school district for injuries he received while sledding on school premises during a scheduled recess period.[12] The appellate court upheld the dismissal of the complaint. There was no proof that the school's rule against sledding was promulgated for any reason other than to prevent classroom distractions. A teacher who observed the sledding distracting her class had gestured for the plaintiff to leave the area. She was not found required to take energetic steps to intervene in an activity common to the student body. Lack of supervision was not the proximate cause of the student's injuries.

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10. Logan v. City of N.Y., 543 N.Y.S.2d 661 (App. Div. 1989).

11. Gooden v. State, 546 So. 2d 279 (La. Ct. App. 1989).

12. Gattyan v. Scarsdale Union Free School Dist. No. 1, 543 N.Y.S.2d 732 (App. Div. 1989).

In a case with highly dramatic circumstances, a Kansas teenager, later determined to be insane, shot and killed his junior high school principal and wounded three other people. A teacher and a student, each of whom had been shot in the leg, brought an action against the school district and the teenager to recover for damages.[13] The court held that the Kansas Workers' Compensation Act barred the teacher's action against the district. The jury was, however, allowed to apportion fault to the school district. In finding against the teenager, the court found that an insane person who shoots another can be held civilly liable. An insane person can be found to have acted intentionally, even if his motives were entirely irrational.

A Louisiana elementary student fell while she was running to get a drink of water from an outside drinking fountain located on school grounds. Her successful suit for damages was appealed by the school board.[14] That decision was reversed as the court found no actual or constructive notice of a defect. In addition, expert testimony indicated no causal relationship between the student's fall and a condition of osteomyelitis which developed in her hip.

A newspaper reporter was allowed to enter a classroom in a New York school district's alternative education program. The parents of a student who was interviewed brought an action alleging negligent supervision and breach of a common-law right to privacy.[15] The court explained that New York does not recognize a common-law right of privacy. Additionally, a determination was made that adequate supervision does not encompass a duty to protect students from the publication of a newspaper.

Shortly after the start of the school day, a New York student left his classroom without permission and approached a fellow student. After an exchange of words, the boy allegedly struck and injured the second student who brought suit against the school district.[16] The court granted a summary judgment for the district, finding no factual basis that the district had actual knowledge constituting notice of a particular danger at a particular time.

A New York school district appealed the denial of its motion to dismiss a student's negligence action.[17] The student was injured in an altercation with an older student during recess. In upholding the motion, the appeals court identified a number of issues which needed resolution by a jury. The complaint alleged that the plaintiff told his teacher that the older student had tripped him shortly before the attack in question, and that she had taken no action. It was also alleged that the lunchroom aides sat on a bench talking with each other during the incident in violation of written rules. Finally, there was the question of whether the teacher and principal should have foreseen the possibility of the altercation.

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[13] Williams v. Kearbey, 775 P.2d 670 (Kan. Ct. App. 1989).

[14] Morris v. Orleans Parish School Bd., 544 So. 2d 440 (La. Ct. App. 1989).

[15] Prescott v. Newsday, Inc., 541 N.Y.S.2d 501 (App. Div. 1989).

[16] Schleckler v. Connetquot Cent. School Dist., 541 N.Y.S.2d 127 (App. Div. 1989).

[17] James v. Gloversville Enlarged School Dist., 548 N.Y.S.2d 87 (App. Div. 1989).

An eighth-grade student was injured while trying to break up a fight between two of his New York classmates. His action against the school district and classmates was dismissed for failure to state an action.[18] The court found the "danger invites rescue" doctrine did not apply. There was no testimony that the fighting students were actually at risk of serious injury, or that the altercation rose to the level of a perilous situation which invited rescue.

En route to and from School. A nine-year-old Kansas student, who got off his school bus and stopped to pick some flowers for his grandmother, was struck by an automobile as he attempted to cross the street to reach his house. His parents claimed that the school district was negligent in its operation of the bus; specifically, that the student was required to cross the street to reach his home. The Kansas Supreme Court disagreed finding that the bus driver had no idea that the student had been crossing the street.[19] Prior to the first day of school, parents had been informed of the bus routes and requested that they choose the nearest stop on the same side of the street as their house. The student had never before crossed the street within the view of the bus, and on the day of the accident did not attempt to cross the street until long after the bus had departed.

The father of a third-grade Illinois girl contacted the principal of her school regarding the harassment of his daughter by an older student. Since the problems primarily had taken place after the students departed their buses and waited for the school doors to open, the principal changed the older student's bus stop and took other precautions. Despite these actions, the girl suffered a partial loss of vision in one eye when she was hit by the older student after departing her bus. The plaintiffs appealed the directed verdict granted the

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18. Ha-Sadi v. South Country Cent. School Dist., 539 N.Y.S.2d 47 (App. Div. 1989).

19. Hackler v. Unified School Dist. No. 500, 777 P.2d 839 (Kan. 1989). *See* Mount Pleasant Indep. School Dist. v. Estate of Lindburg, 766 S.W.2d 208 (Tex. 1989). A school district was not held liable for the death of a student who was struck and killed when she crossed the road after the school bus was a quarter of a mile away. Ordinary care was the appropriate standard by which to judge the district's actions. Kramer v. Lagnese, 535 N.Y.S.2d 13 (App. Div. 1988). The duty of a bus company and driver to a child terminated when she alighted safely on the curb.

school district in the action brought on behalf of the girl.[20] The court found that the absence of willful and wanton misconduct precluded liability on the part of the school district.

The parents of an Illinois school bus passenger brought an action against the bus driver for the crippling injuries sustained by their daughter.[21] The court determined that a neutral posture on both the trial and appellate levels was appropriate and able to insure the rights of the mentally incompetent minor. In finding for the bus driver, the attachment of wooden blocks to the gas pedal was not found to have created a dangerous condition which inhibited the driver from taking defensive action to prevent the accident.

An Arizona high school student was injured when she was struck by an automobile while crossing the street in a crosswalk opposite an elementary school. The court of appeals found no duty owed to a high-school age pedestrian deemed to have sufficient judgment and maturity to cross the street.[22]

A five-year-old Illinois kindergarten student was injured when he was struck by an automobile in an intersection adjacent to his schoolyard. The court of appeals affirmed the trial court decision for the school board in the suit for damages brought by the student's father.[23] The court held that without a showing of willful and wanton conduct, or evidence of prior accidents involving other children, liability could not be assigned to the school.

School Buildings and Grounds. A member of a community theater group brought a personal injury action against an Alabama school district.[24] While assisting in the preparation of a stage set, he was struck by a metal bar that supported the stage lighting fixtures in a high school auditorium. The theater group, which was not part of the school system, had been granted permission by the school board and principal to use the auditorium free of charge subject to the board's rules and regulations governing the use of school facilities. In denying the plaintiff's claim, the court found no expressed or implied contract to furnish the theater group with a safe facility. The group's use of the facility was predicated upon a regulation in which it assumed full liability for any and all personal injuries arising from the use of the facility.

A North Carolina driver and her passengers were injured in an accident when their automobile was struck while they were backing out of a school parking lot. Their suit against the school district charged negligent and improper design of the parking lot entrance, failure to maintain the parking lot in a reasonably safe condition, and failure to properly direct traffic out onto the highway.[25] The trial court granted summary judgment for the school district and the plaintiffs appealed. In affirming for the school district, the court denied the plaintiffs' contention they were invitees to the property. Although there was a basketball game going on at the school at the time of the accident, the plaintiffs' sole reason for turning into the driveway was to turn around. In addition, while the court recognized that a higher level of care is owed to young children who are unable to appreciate a potential danger, such a duty was not owed to the minor plaintiffs who were accompanied by an adult who had knowledge of the potential hazard.

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[20] Templar v. Decatur Pub. School Dist. No. 61, 538 N.E.2d 195 (Ill. App. Ct. 1989).

[21] Cogan v. Kal Leasing, Inc., 546 N.E.2d 20 (Ill. App. Ct. 1989).

[22] Alhambra School Dist. v. Superior Court, 780 P.2d 401 (Ariz. Ct. App. 1989).

[23] Winston v. Board of Educ. of Chicago, 537 N.E.2d 964 (Ill. App. Ct. 1989).

[24] Vardaman v. Florence City Bd. of Educ. 544 So. 2d 962 (Ala. 1989).

While taking her daughter to a school play, a Louisiana woman fell off a curb at the end of a sidewalk. In an action for damages, she contended her fall was the result of a negligent and defective condition for which the school board was responsible.[26] The court of appeals reversed the trial court's decision for the plaintiff. Although the accident took place at night, the woman was found to have a duty to proceed with greater caution than in daylight. The existence of a curb at the end of a sidewalk was not found to have created an unreasonable risk of harm.

An Idaho junior high school student was injured when he tripped over sprinkler pipes while playing football on the school's field before school. He sought appeal when his personal injury claim against the school district was dismissed by the trial court.[27] In reversing the decision, the appellate court held that the state's recreational use statute did not apply. The court explained that if the statute were applied to injuries children suffered while on school premises, the special relationship that a student has to a school district would be impaired. Furthermore, although the injury occurred before school, testimony indicated that the principal was aware of the football game. Since the student was thus under the supervision, authority, and control of the district, he was owed a duty of care for his safety.

An Illinois student was injured in physical education class when another student fell into him after stepping on an uneven portion of the field during a touch football game. His action against the school district for damages alleged a failure to keep the field in reasonably safe condition, and negligence when students were required to use the field without sufficient warning.[28] The court found for the school district holding both the defective equipment and premises liability analysis inapplicable.

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[25] Yates v. J.W. Campbell Elec. Corp., 382 S.E.2d 860 (N.C. Ct. App. 1989).

[26] Williams v. Orleans Parish School Bd., 541 So. 2d 228 (La. Ct. App. 1989).

[27] Bauer v. Minidoka School Dist. No. 331, 778 P.2d 336 (Idaho 1989).

A twelve-year-old Louisiana girl was injured when she stepped in a hole at the base of a tree in her school's playground. The parish school board appealed the civil district court award of damages to the student.[29] The appellate court held that the hole, which was surrounded by a root and covered with grass, posed an unreasonable risk of harm. The fact that the condition was not easily discoverable did not serve to absolve the school district from blame.

School-related Activities. Automobile accident victims brought an action against a Georgia school that had hired an off-duty police officer to direct traffic during a school festival.[30] The victims alleged that the officer's instructions led to their accident. In denying the claim, the court held that since the officer was acting as an independent contractor at the time of the accident, the school could not be held liable.

An Ohio student purchased a ticket to a school football game which was being held at the local fairgrounds. He died after inhaling helium from a tank left on the fairgrounds. The student's father brought a wrongful death action against the helium distributor, manufacturer, fairgrounds owner, and the school board.[31] The trial court dismissed the action against all the defendants and the father appealed. The Ohio Supreme Court affirmed the decision holding the distributor owed no duty to the student, and the fairgrounds owner was not liable absent conduct which was willful and wanton.

NEGLIGENCE DEFENSES

Immunity

The most commonly used defense has been governmental (sovereign) immunity. Courts have traditionally been reluctant to disturb this defense as school districts are state agencies created by state law to perform a governmental function. However, the use of this defense is increasingly being restricted by statute as well as judicial interpretation. Litigation in this area generally seeks to test limits and exceptions.

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[28] Brock v. Rockridge Community Unit Dist. 300, 539 N.E.2d 445 (Ill. App. Ct. 1989).

[29] Levie v. Orleans Parish School Bd., 537 So. 2d 351 (La. Ct. App. 1988).

[30] Beck v. Paideia School, Inc., 381 S.E.2d 132 (Ga. Ct. App. 1989).

[31] Jeffers v. Olexo, 539 N.E.2d 614 (Ohio 1989).

Common Law (Governmental Immunity). The parents of a Michigan student brought an action to recover for injuries sustained by their son on a school playground. The trial court granted a summary disposition of the case in favor of the school, but denied it to the school superintendent and principal. That decision was reversed on appeal.[32] The superintendent was not found entitled to absolute immunity as the highest executive official of the school. However, he and the principal were entitled to limited governmental immunity as their actions in setting policy concerning supervision of students on the playground were seen as discretionary.

A Michigan volunteer teaching assistant brought a negligence action after being attacked and raped while at school. The suit named the city, board of education, superintendent, principal, head of security, and security guards as defendants. The plaintiff appealed the trial court's partial summary judgment.[33] The issues under consideration were the intentional nuisance claim, the determination of which acts were ministerial and which were discretionary, and the availability of vicarious liability. The court denied the intentional nuisance claim as the complaint did not indicate that the defendants intended to create an unsafe building. The actions of the superintendent and principal were found to require deliberation, decision-making, and judgment. Therefore, they were found to be discretionary-decisional acts for which immunity is available. As to the security personnel, the essence of their duties was to follow or implement security procedures. These were ministerial actions and not found to be immune from tort liability. Finally, specific conditions of nongovernmental activity were not present so as to make the school board vicariously liable.

A teacher was assaulted and injured while he was stationed at an open gate at the end of a New York City school playground. His action against the board of education alleged that it negligently allowed the gate to remain broken and failed to provide adequate security.[34] Finding the provision of security to be a governmental function, the court held the school board immune from liability.

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[32] Kirschner v. Carney-Nadeau Pub. Schools, 436 N.W.2d 416 (Mich. Ct. App. 1989).

[33] Giddings v. City of Detroit, 444 N.W.2d 242 (Mich. Ct. App. 1989).

[34] Bonner v. City of N.Y., 539 N.Y.S.2d 728 (App. Div. 1989).

While a Pennsylvania student was driving himself between his high school and vocational school, he caused an automobile accident which killed a mother and injured two of her children. Suit was brought against the county vocational school for fatal and nonfatal injuries.[35] In finding for the defense, the court found that the vehicle exception to sovereign immunity applies only to situations where an employee actually operates the vehicle in question. Furthermore, while damages could be recovered if the student was acting as an employee of the school, the court rejected this assertion.

A seven-year-old Missouri student was injured when she was struck by an automobile when she fell into the street as she walked between two school buses. An action was brought against the assistant principal and a teacher alleging a failure to properly escort the student, supervise her actions, or warn her of the potential danger. The trial court dismissed the action, finding the defendants immune from liability, and the plaintiff appealed.[36] While expressing no opinion on whether a cause of action had been stated, the appeals court reversed the decision and remanded the case for trial. The defendants were not found to be public officers immune from liability for their discretionary acts.

A Pennsylvania middle-school student was sexually assaulted while attending a school sponsored workshop. Her suit against the school district and various school employees was dismissed by the trial court. In the appeal of that decision, the plaintiffs contended that the action fell under the real estate exception to the district's defense of immunity.[37] The appellate court concluded that the exception did not apply as there was no injury caused by a defect in the land itself, but rather a result of the actions of another student.

An 800-pound wood lathe, which had never been bolted to the school's floor, was determined by a Pennsylvania Commonwealth Court not to be a part of the realty.[38] Therefore, a high school student who was injured while using the lathe in shop class could not bring suit under the real property exclusion to the school district's immunity.

When a Utah high school pumped water from its basement out onto an adjoining field, the basement of a house on adjacent property was flooded causing damage to the home. The school district's defense against the homeowner's negligence action was the immunity a governmental agency enjoys for the management of flood waters. In rejecting this argument, the Utah Supreme Court found the school district liable as its actions were found indistinguishable from those any other land owner might take to protect its property.[39]

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[35] Capuzzi v. Heller, 558 A.2d 596 (Pa. Commw. Ct. 1989).

[36] Jackson v. Roberts, 774 S.W.2d 860 (Mo. Ct. App. 1989).

[37] Cotter v. School Dist. of Philadelphia, 562 A.2d 1029 (Pa. Commw. Ct. 1989).

[38] Canon-McMillan School Dist. v. Bioni, 561 A.2d 853 (Pa. Commw. Ct. 1989).

Another Utah homeowner sought compensation for water damage to his property. In this instance, a runoff problem was created when a school resurfaced its parking lot. Again the court rejected the school district's flood control defense.[40]

A handicapped Illinois student was injured when she was thrown from her wheelchair while being taken to a district maintained playground across the street from her school. She brought suit against the school district and city, and the city filed a counterclaim against the district. The trial court found the district immune, dismissed the claims, and the plaintiff and city appealed.[41] The parents of the student had previously informed the school of the necessity of using the seatbelt attached to the wheelchair. At the time of the accident, the seatbelt was not in use and the student was being pushed to the playground by a classmate. In its reversal of the decision, the appellate court found the district guilty of willful and wanton misconduct.

The Idaho Supreme Court referred to the tragic death of a six-year-old boy when it reversed a decision which had found a principal and school district immune from liability.[42] The boy had become unconscious, and his mother, who was working in the school that day, shouted to another teacher to call an ambulance. The principal stopped the call and walked to the scene which was over 200 feet away. He then carried the child back to the office, and requested an ambulance. Expert testimony stated that timely action, involving trained assistance even a minute sooner, would have saved the boy's life. The court found that the discretionary function exception to liability does not apply to negligent operational decision-making. Deciding to call off an ambulance and failing to give adequate first aid were not seen as basic policy decisions for which immunity was a defense.

A six-year-old Florida student was injured by a classmate during horseplay which occurred as the students were preparing to enter their respective classrooms. The action against the school district al-

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39. Branam v. Provo School Dist., 780 P.2d 810 (Utah 1989).

40. Williams v. Carbon County Bd. of Educ., 780 P.2d 816 (Utah 1989).

41. Bertetto v. Sparta Community Unit District No. 140, 544 N.E.2d 1140 (Ill. App. Ct. 1989).

42. Czaplicki v. Gooding Joint School Dist. No. 231, 775 P.2d 640 (Idaho 1989).

leged the principal negligently deviated from the county school manual by not having school teachers on duty as supervisory personnel at classroom doorways.[43] In reversing the trial court's decision for the school district, the appeals court found that sovereign immunity was not an appropriate defense for the negligent performance of an operational duty. The plaintiff's claim was not that an inadequate number of supervisory personnel were assigned, but that the principal had negligently failed to carry out an operational duty to deploy personnel in accord with the school board manual.

An eighth-grade special education student was injured while using a table saw in his woodworking class. The court refused to grant the Kansas school district's motion to dismiss the action for damages brought on behalf of the student.[44] The duties of informing the woodworking teacher that the child was handicapped, and of providing instructions on safety procedures, were not discretionary and thus not entitled to immunity.

While attempting to hold an eight-year-old student in position to administer corporal punishment, a Georgia principal broke the student's arm. The trial court found the principal immune from liability, and the student appealed.[45] In reversing the decision, the appellate court found it a matter for the jury to decide whether the principal exercised sound discretion in the administration of the punishment, and whether it was excessive or unduly severe.

Statutory Immunity. While an Arkansas school district's tractor was pulling a mower on school premises, it caused a rock to be thrown at a student resulting in blindness in one eye. Suit for injuries was brought against the school district.[46] As the tractor was being operated by a school employee under the direction of a maintenance supervisor, the district was found immune from liability. In addition, the tractor and mower were not found to be motor vehicles for which insurance would be required.

The mother of an Illinois student sued the school district for injuries incurred by her daughter who fell while skipping rope on a cracked and uneven sidewalk.[47] The court of appeals recognized that the school district was not immune from an action brought on the theory of landowner's premises liability. However, the court did find the district immune for liability for ordinary negligence where sufficient factual allegations of willful and wanton misconduct were not alleged.

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[43] Bonica v. Dade County School Bd., 549 So. 2d 220 (Fla. Dist. Ct. App. 1989).

[44] Greider v. Shawnee Mission Unified School Dist. No. 512, 710 F. Supp. 296 (D. Kan. 1989).

[45] Crews v. McQueen, 385 S.E.2d 712 (Ga. Ct. App. 1989).

[46] Cousins v. Dennis, 767 S.W.2d 296 (Ark. 1989).

[47] Ramos v. Waukegan Community Unit School Dist. No. 60, 544 N.E.2d 1302 (Ill. Ct. App. 1989).

A Mississippi school district was determined to have properly asserted a defense of sovereign immunity in an action which arose from a school bus accident.[48] Then the court examined the degree of the financial liability for the damages resulting from the negligent operation of the school bus. The court found the district's liability statutorily limited to $10,000 for personal injuries, and $1,000 for property damage.

The waiver of a teacher's qualified immunity was at issue following the injury of a Texas high school student.[49] The injury occurred during an automobile mechanics class when the student attempted to "prime" the carburetor by pouring gasoline directly into it. When another student turned the ignition, the resulting explosion severely burned the plaintiff. The court of appeals affirmed the district court's decision for the teacher and school district. The circumstances were not found to have involved the operation or use of an automobile within the meaning of the statute waiving sovereign immunity.

When a fourteen-year-old Pennsylvania student lost control of his bicycle in a gravel storm ditch, he sustained serious injuries including a shattered kidney, brain damage, and permanent disfigurement. In a civil suit for damages, the borough and school district were alleged to have negligently allowed a dangerous condition to exist on a playground.[50] The trial court's decision for the plaintiff was reversed on appeal. The district was found to owe no duty of care to the student who was using the premises for recreational purposes. Therefore, the district was immune from liability under the Recreation Use of Land and Water Act.[51]

A Michigan student was injured on a snow pile which remained on the school's playground after the school's parking lot had been plowed. The trial court granted a summary judgment in favor of the school district and the plaintiffs appealed.[52] The appellate court affirmed the lower court decision, finding that the temporary accumulation of snow did not create an intentional nuisance overcoming the district's claim of immunity.

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48. Richardson v. Rankin County School Dist., 540 So. 2d 5 (Miss. 1989).
49. Naranjo v. Southwest Indep. School Dist., 777 S.W.2d 190 (Tex. Ct. App. 1989).
50. DiMino v. Borough of Pottstown, 564 A.2d 1329 (Pa. Commw. Ct. 1989).
51. Pa. Stat. Ann. tit. 68 § 477-3, 477-6 (West Supp. 1990).
52. Hendricks v. Southfield Pub. Schools, 444 N.W.2d 143 (Mich. Ct. App. 1989).

A Pennsylvania school district was sued by a pedestrian for injuries sustained when he fell on an accumulation of ice and snow on a sidewalk. The district's immunity defense was recognized by the trial court and the pedestrian appealed.[53] The sole question examined was whether an accumulation of snow and ice can constitute a dangerous condition of sidewalks under the governmental immunity provisions of the Judicial Code, thus rendering the district not immune from possible liability. In reversing the decision, the appeals court recognized that the snow and ice had accumulated in hills and ridges, and that the district had actual or constructive notice of the condition. Therefore, the district was found to have a duty to correct the condition.

A Montana woman fell down the alley stairs leading to a school gymnasium. Her suit against the school district and chairman of the board of trustees alleged her fall was caused by a failure to light and remove ice and snow from the stairway.[54] The trial court allowed the plaintiffs to add the principal and janitors as additional defendants, but when the court denied the additional defendants summary judgment they filed for a writ of supervisory control. The appeals court held that the principal and janitors were properly added; however, this was not found to affect liability. The school district and its individual employees were determined to be immune from liability for the school board's failure to provide funding for additional custodians and maintenance of the stairway.

Statutory immunity of a different nature was recognized in a Louisiana case. A teacher, who was also a justice of the peace, was found entitled to judicial immunity when charged with negligently refusing to issue an arrest warrant for a high school student.[55]

Other Defenses

Notice of Claim. A New York appeals court upheld a lower court decision allowing a late notice of claim against a school.[56] The incident had been witnessed by at least one employee of the district, and the school had quickly received written detailed reports of the student's injuries. The district failed to show that it was prejudiced by a late notice of claim, or that its ability to investigate the claim had in any way been impaired.

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[53] Giosa v. School Dist. of Philadelphia, 562 A.2d 411 (Pa. Commw. Ct. 1989).

[54] State *ex rel.* Eccleston v. Montana Third Judicial Dist. Ct., 783 P.2d 363 (Mont. 1989).

[55] Moore v. Taylor, 541 So. 2d 378 (La. Ct. App. 1989).

[56] Friedman v. Syosset Cent. School Dist., 545 N.Y.S.2d 814 (App. Div. 1989).

A school bus driver who was injured in the course of her employment brought an action for damages against her Georgia county school district.[57] The trial court denied the district's motion to dismiss the action due to a failure by the plaintiff to give timely notice of her injuries. The Georgia Supreme Court held that a twelve month statute of limitations for claims against a county did not apply to claims against a county school district.

On appeal, a late notice of claim was allowed in a negligence action brought against a city board of education for injuries sustained when the plaintiff slipped and fell on a New York high school's stairs.[58] A comptroller's hearing, held within four months of the injury, was found to have given the board of education sufficient information to investigate the injury.

An Indiana teacher challenged her dismissal on constitutional grounds. Reversing the decision of the trial court and remanding the case for trial, the Indiana Supreme Court held that a 180 day notice of claim period did not apply to the teacher's civil rights claim.[59]

The wife of a New York fall victim sought to file a late notice of claim for psychological problems, including a suicide attempt and resulting paraplegia. The court allowed the late notice as the problems resulting from the fall were found to be components of his injuries for which the school district had been timely notified.[60]

A New York student, who had been injured three years earlier in a gymnasium class, sought to file a late notice of claim against the school.[61] In denying relief, the appeals court found that the petitioner failed to adequately explain the three-year delay. The court failed to recognize the claim of late notice due to the infancy of the injured and to the parental claim of unfamiliarity of the law.

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57. Payne v. Blackwell, 384 S.E.2d 393 (Ga. 1989). *See also* Cassidy v. Board of Educ., 557 A.2d 227 (Md. 1989). Where a court dismisses a first complaint for failure to allege a notice of claim, a subsequent action where notice requirements are met is not precluded. Commercial Union Ins. Co. v. La Villa Indep. School Dist., 779 S.W.2d 102 (Tex. Ct. App. 1989). Representations by a contractor that he was going to repair paint problems in a school gymnasium did not serve to toll a statute of limitations.

58. Calia v. Board of Educ., 546 N.Y.S.2d 646 (App. Div. 1989).

59. Werblo v. Board of Trustees, 537 N.E.2d 499 (Ind. 1989). In Sullivan v. Board of Educ., 546 N.Y.S.2d 665 (App. Div. 1989) a principal's action alleging defamation and intentional infliction of emotional distress was barred by a late notice of claim. In Lourdes High School v. Sheffield Brick & Tile Co., 870 F.2d 443 (8th Cir. 1989) the Minnesota statute of repose was held constitutional, thereby barring a high school's action against a flooring manufacturer.

60. Fish v. New York Mills Union Free School Dist., 543 N.Y.S.2d 774 (App. Div. 1989).

61. Schirripa v. Birch Lane Elementary School, 546 N.Y.S.2d 160 (App. Div. 1989).

The parents of a Maine student who claimed his fifth-grade teacher made improper sexual advances brought an action for damages against the city, school system, and the principal.[62] Summary judgment was granted in favor of the defendants as the plaintiff had failed to file a notice of claim within 180 days of the incident. The parents failed to establish they were, in some meaningful way, prevented for nearly two years from learning of prior incidents involving the teacher.

A parent of an Oklahoma student sued the school district, board of education, and school bus driver for the sexual assault of her daughter by the driver.[63] The action was commenced after it was revealed during his trial and conviction that the driver had prior convictions for sexual crimes. The trial court's summary judgment for the school district was upheld on appeal. The court found that additional requests for information by the defendant's insurance company did not serve to extend the statutory period of limitations.

A New York appeals court held that since the wife of a plaintiff in a personal injury case was not a party when the action commenced, she could not assert a derivative claim. Her cause of action, brought three-and-one-half years later, was found subject to the one-year ninety-day statute of limitations.[64]

Comparative Negligence. A Missouri student was injured when the school bus in which she was riding pulled forward while she was standing in the aisle. Her appeal of the trial court's decision centered on the question of whether a fair trial was prevented by the instructions given to the jury.[65] The appellate court concluded that jury instructions, which stated the student must be assessed a percentage of fault for failing to follow the bus driver's instructions, were proper.

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[62] Gardner v. City of Biddeford, 565 A.2d 329 (Me. 1989). In Commonwealth v. Willis, 552 A.2d 682 (Pa. Super. Ct. 1988) the inconsistent testimony of an eight-year-old student who had been sexually abused by a teacher was found sufficient to support a finding of guilt.

[63] Doe v. Independent School Dist. No. I-89, 780 P.2d 659 (Okla. 1988).

[64] Kettle v. Sweet Home Cent. School Dist., 543 N.Y.S.2d 783 (App. Div. 1989). *See also* Spedding v. Bowman, 544 N.Y.S.2d 93 (App. Div. 1989). A teacher seeking reinstatement, back pay, and benefits was required to file a notice of claim prior to bringing an action against the school district or board of education. Pueblo School Dist. No. 60 v. Clementi, 776 P.2d 1152 (Colo. Ct. App. 1989). An administrative law judge was found to have abused his discretion by not holding a full hearing on the district's claim that it had timely filed a petition to review the judge's original order. Castagna & Son, Inc. v. Board of Educ. of N.Y., 542 N.Y.S.2d 622 (App. Div. 1989). A contractor's claim for delay damages was barred by a late notice of claim. Lopez v. Brentwood Union Free School Dist., 539 N.Y.S.2d 969 (App. Div. 1989). An action against a school district for injuries sustained by individuals on school property was dismissed for failure to serve timely notice.

[65] Cooks v. Normandy School Dist., 778 S.W.2d 339 (Mo. Ct. App. 1989).

A Louisiana school bus driver struck a parked van when he attempted to pull onto a narrow side street. Parents of the children who were injured while riding in the bus brought suit against the school district and the owner of the van.[66] The court of appeals upheld the lower court finding of negligence by the bus driver, but reversed the decision regarding the driver of the van. She was found 30% at fault for impeding traffic by parking in a no parking zone.

LIABILITY INSURANCE

Twelve cases involved questions concerning liability insurance. In only four of these was the liability insurer successful in limiting its responsibility.

Following the sexual abuse of a California third-grade student by her teacher, the school district's insurer sought a declaratory judgment that the educator's employment liability policy did not provide coverage for the abuse. After a lower court decision for the insurer, the pupil appealed.[67] While expressing sympathy for the injuries suffered by the student, the court failed to expand the policy's coverage. The event did not occur while the teacher was engaged in an activity reasonably related to the goal of educating children, and therefore was not covered by the policy.

The insurer of the parents of a Massachusetts youth who broke into a school and started a fire, sought a declaration that the parent's homeowner's policy did not provide coverage for the damage caused by the fire. The court found applicable the language in the policy which excluded property damage expected or intended by the insured.[68]

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[66] Simpson v. Caddo Parish School Bd., 540 So. 2d 997 (La. Ct. App. 1989).

[67] Horace Mann Ins. v. Analisa N., 263 Cal. Rptr. 61 (Ct. App. 1989). *See* Matta v. Board of Educ., 552 A.2d 1340 (Md. Ct. Spec. App. 1989). School board was not obligated to provide a defense or insurance coverage for a teacher accused of inappropriate sexual conduct with a student.

[68] City of Newton v. Krasnigor, 536 N.E.2d 1078 (Mass. 1989).

A Kansas board of education brought suit against its liability insurer to recover expenses from ongoing school desegregation.[69] The Kansas Federal District Court upheld the insurer's motion for summary judgment. The expenses incurred by the school district were found within the outstanding litigation exception to coverage under the liability policy.

A mini-van owned and operated by an Alabama school district exploded killing the employee driver. The school district's insurer appealed a decision that it was obligated to defend and indemnify the school district employees sued by the survivors of the employee.[70] After the board of education was dismissed from the suit, the question involved only four supervisory employees. The court found the insurance company did have an obligation to them. Although coverage was excluded for liability arising out of the operation or ownership of an automobile, the supervisors did not own or operate the vehicle. Furthermore, the driver was not an employee of the supervisors, but of the board. Finally, when doubt exists concerning the coverage under an insurance policy, the language used by the insurer should be construed for the benefit of the insured.

A school district's excess insurer brought an action to recover the excess benefits it paid for injuries a Minnesota student sustained while playing basketball with an insured student assistant in gym class. The insurer sought reimbursement from the student assistant's homeowner's insurer.[71] The court held that the excess insurer was obligated to pay for the student's injuries. The excess clause in the umbrella policy was determined only to limit the secondary insurer's liability as it related to the primary insurer.

A motor vehicle insurer brought an action against a Georgia school board to determine whether an accident which had killed a student was covered by the policy issued to the board. Following a decision in favor of the school board, the student's parents appealed.[72] The court of appeals upheld the decision finding that any error which had arisen from allowing the jury to consider the reasonableness of the student's conduct was harmless. The jury did not reach that issue as it had confined itself to the question of whether the bus driver had instructed the student, or given instructions which could have been misinterpreted, which caused the student to cross a busy highway.

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[69] Unified School Dist. No. 501 v. Continental Casualty Co., 723 F. Supp. 564 (D. Kan. 1989). For a case with similar reasoning but a different conclusion *see* Bachmayer v. Toledo Bd. of Educ., 541 N.E.2d 1078 (Ohio Ct. App. 1988). A school board was statutorily required to defend and indemnify a teacher who was a plaintiff in a negligence action brought against both parties by a student injured in the teacher's class.

[70] Guaranty Nat'l Ins. Co. v. Marshall County Bd. of Educ., 540 So. 2d 746 (Ala. 1989). *See also* St. Paul Guardian Ins. Co. v. Canterbury School of Fla., 548 So. 2d 1159 (Fla. Ct. App. 1989). A school district was covered by its liability policy where the identity of the insureds was not found ambiguous. In Geneva County Bd. of Educ. v. CNA Ins. Co., 874 F.2d 1491 (11th Cir. 1989) a county board of education was entitled to compensatory damages for fraud by an insurer regarding the extent of its coverage of the board.

[71] Interstate Fire & Casualty Co. v Auto-Owners Ins. Co., 433 N.W.2d 82 (Minn. 1988).

A school district's insurer sought to invoke the Education for the Handicapped Act in a third-party action it brought against a Pennsylvania school district.[73] The injuries sustained by a child in an automobile accident left her in need of special education services. The court held that the obligation of the school district to provide services for a handicapped child did not relieve the insurer from its obligation to provide services to the child.

ATTORNEY FEES

An Alabama elementary school board filed a petition to find a county board of education in contempt for violating a writ ordering the removal of one principal and the assignment of another. On appeal, the court found the county board was properly held in contempt and was responsible for the attorney fees incurred in the proceeding.[74]

After a Colorado plaintiff was successful in a civil rights action, a hearing was held to determine the amount of the recovery of damages and attorneys fees.[75] The court determined that fees in such a case should be calculated as if there was a contract calling for a reasonable hourly rate not contingent on the success or failure of the action. This resulted in a reduction of more than 300 hours from the attorney's claim of 1,000 hours spent in litigating the lawsuit.

A Rhode Island elementary school principal successfully defended himself against charges of sexual assault on girls who attended his school. He then sought recognition of statutory indemnification for legal services. The court held that the statute only applied in civil actions, unlike the criminal proceedings which had involved the principal.[76]

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[72] Cawthon v. Waco Fire & Casualty Ins. Co., 380 S.E.2d 327 (Ga. Ct. App. 1989).

[73] Gehman v. Prudential Property and Casualty Ins. Co., 702 F. Supp. 1192 (E.D.

[74] *Ex parte* Cleburne County Bd. of Educ., 545 So. 2d 802 (Ala. Civ. App. 1989).

[75] Cunico v. Pueblo School Dist. No. 60, 705 F. Supp. 1466 (D. Colo. 1988).

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A California worker who was injured during her employment as a teaching assistant was successful in her challenge of a workers' compensation appeals board decision disallowing temporary indemnity.[77] The court held that since her full wages were less than the statutory minimum for calculating temporary indemnity, she was entitled to temporary disability payments at the statutory minimum rate throughout the period of her disability.

A Florida employer sought review of an order for workers' compensation benefits.[78] The court found the employer's past weekly contribution to the employee's retirement program was properly included when determining benefits for a job-related injury.

A New Jersey widow sought continuation benefits for the two months a year she did not work as a teacher.[79] The court determined that she was entitled to the benefits as the collective bargaining agreement did not give her a choice between being a ten-month or twelve-month employee.

An Illinois school bus driver was injured when her bus collided with an automobile. She was successful in her action for an adjustment in her claim under the Workers' Compensation Act.[80] The court found that an earlier decision that her surgery was not related to the accident was contrary to the evidence presented by her physician.

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[76] Monti v. Warwick School Comm., 554 A.2d 638 (R.I. 1989).

[77] Hayes v. Workers' Compensation Appeals Bd., 261 Cal. Rptr. 908 (Ct. App. 1989).

[78] Hillsborough County School Bd. v. Fliter, 539 So. 2d 1145 (Fla. Dist. Ct. App. 1989). *See also* Polk County School Bd. v. Cobbett, 547 So. 2d 991 (Fla. Dist. Ct. App. 1989). Evidence that a claimant was not totally and permanently disabled, and the determination that the claimant's retirement benefits had not vested, meant that only 35% of the claimant's sick leave benefits could be used in calculating the claimant's average weekly wage.

[79] Sarisky v. E.R. Squibb and Sons, Inc., 559 A.2d 471 (N.J. Super. Ct. App. Div. 1989). In Myles v. Paragould School Dist., 770 S.W.2d 675 (Ark. Ct. App. 1989) the limitations period for filing a claim for additional benefits was found to have begun when the claimant received a late benefit payment, rather than from the time his benefits were scheduled to end.

[80] Edgcomb v. Industrial Comm'n, 536 N.E.2d 1364 (Ill. App. Ct. 1989). *See* Askew v. Ann Arbor Pub. Schools, 433 N.W.2d 800 (Mich. 1988). An injured worker was not required to present evidence of a change in his physical condition to preserve his right to a hearing on a further claim related to the same injury.

The abbreviated physical examination performed by the employer's physician was seen as inadequate given the driver's symptoms.

A New Mexico teacher was injured when she fell off a platform leading to a portable classroom. She was unsuccessful in her appeal from the compensation order.[81] Evidence supported that the psychological condition from which the teacher was suffering was temporary, precluding an increase in her partial disability rating. In denying certain medical bills, the court explained that an injured worker cannot be compensated for independent medical treatment when the employer has indicated a willingness to furnish treatment, and has actively made such services available.

The denial of her workers' compensation benefits to a part-time school district assistant cook was upheld on appeal to the Supreme Court of North Dakota.[82] The cook failed to establish the extent of her disability by refusing to return to work on a modified basis.

A Florida school board employee was injured when the brace she wore on her leg gave way causing her to fall and fracture her ankle. The employee had needed a brace since contracting polio as a youth. The denial of her workers' compensation claim was upheld as the court saw the fall and injury as solely a result of her personal condition.[83] The court explained that to compensate the employee for this type of injury would violate the legislative intention of the applicable statutes.

A New York board of education was successful in an action challenging an employee's award under the Workers' Occupational Diseases Act.[84] A teacher's mental disorder had developed over a period of twelve to sixteen months, and reached the level of suicidal depression after he was slapped by an eighth-grade girl. The court found that the evidence did not establish that the slapping was an event which arose from a stress situation of a greater dimension than that experienced by other teachers.

An Oregon worker sought review of a workers' compensation board determination that her employer, who was now self-insured, rather than the former insurer, was responsible for her deteriorating back condition.[85] The court reversed the decision, holding that a shift in responsibility to a subsequent employer or insurer requires the subsequent employer to contribute independently to the need for treatment. Because the worker had not experienced a need for treatment as a result of her worsening condition, the court found no basis for shifting responsibility for that condition.

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[81] Bowles v. Los Lunas Schools, 781 P.2d 1178 (N.M. Ct. App. 1989).

[82] Risch v. North Dakota Workers' Compensation Bureau, 447 N.W.2d 308 (N.D. 1989). *See* Dailey v. Royal Ins. Co., 551 So. 2d 55 (La. Ct. App. 1989). A school lunchroom worker was unable to have her benefits increased when expert testimony showed she was not disabled.

[83] Leon County School Bd. v. Grimes, 548 So. 2d 205 (Fla. 1989).

[84] Board of Educ. of Chicago v. Industrial Comm'n, 538 N.E.2d 830 (Ill. App. Ct. 1989).

Failure by a Minnesota school district to promptly report an employee's injury earned a penalty assessment from the workers' compensation division of the Department of Labor and Industry. The appeal of the decision was successful as the court determined that the penalty did not apply to an employer who fails to promptly report a work injury but pays full wages to the employee under a wage continuation program.[86]

DEFAMATION

After a Colorado junior high school coach lost his job, he sued the high school coach for defamation, outrageous conduct, and invasion of privacy.[87] The head coach confronted the plaintiff with has past conviction for child molestation and made the information available to others. The court held that the truth of the statements precluded an action for defamation, and that the actions of the coach did not reach the level of outrageous conduct. Finally, a mere lapse of time since the plaintiff's conviction did not render that information private.

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[85] Columbia County School Dist. No. 13 v. Thurston, 773 P.2d 1354 (Or. Ct. App. 1989). In contrast, in Murray County Bd. of Educ. v. Wilbanks, 379 S.E.2d 559 (Ga. Ct. App. 1989) an employer was required to pay the claimant directly for medical expenses previously paid by the claimant's group insurance carriers.

[86] Urbanski v. Independent School Dist. No. 280, 446 N.W.2d 388 (Minn. 1989). For another case largely decided on procedural grounds *see* Weatherspoon v. Department of Labor and Indus., 777 P.2d 1084 (Wash. Ct. App. 1989). Although the appellate court was not bound by a trial court's findings when based solely on a review of the transcript and administrative hearing, the court undertook a review of the records where there was evidence supporting a challenge to the trial court's findings.

[87] Lindemuth v. Jefferson County School Dist. R-1, 765 P.2d 1057 (Colo. Ct. App. 1988). *See also* Agins v. Darmstadter, 544 N.Y.S.2d 635 (App. Div. 1989). A school superintendent's comments to district and outside personnel were made in the course of his official duties and thus could not be considered defamatory.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A North Carolina student, who was allegedly sexually assaulted by her principal, brought an action against her school's superintendent and the truancy officer.[88] The truancy officer had filed a juvenile petition because of the girl's attendance problems. The court denied the claim of intentional infliction of emotional distress as no evidence was found that the officer knew of the alleged assault, or that he intended to cause emotional distress. In addition, the superintendent was not found negligent in the investigation, hiring, and supervision of the principal. There was no evidence that he knew of the alleged assault or failed to act.

TORTIOUS INTERFERENCE WITH A CONTRACT

A demoted high school principal sued members of a Missouri school board, the school district, and two supervisors, claiming tortious interference with and breach of contract. The plaintiff claimed that the supervisors had falsely accused him of incompetency, written accusatory memos which were exaggerated, and implied that students at his school conducted themselves in a manner which did not occur at other high schools in the district. The trial court's dismissal of the action was affirmed on appeal.[89] The court held that the malice was not material as there was a justifiable purpose for the defendants' actions. Furthermore, there was no evidence that the supervisors were motivated solely by malice or ill will against the principal.

PRODUCT LIABILITY

For several years, cases involving asbestos increasingly have been considered by the courts. This year, a Texas court has allowed certification of a class action suit brought by one school district but involving sixty-six others.[90]

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[88] Medlin v. Bass, 386 S.E.2d 80 (N.C. Ct. App. 1989).

[89] Franklin v. Harris, 762 S.W.2d 847 (Mo. Ct. App. 1989).

[90] National Gypsum v. Kirbyville Indep. School Dist., 770 S.W.2d 621 (Tex. Ct. App. 1989).

Two Kansas school districts brought a liability action concerning the installation of asbestos-containing products in their buildings.[91] The plaintiff companies sought summary judgment contending the action was barred by the applicable statute of limitations. The district court disagreed explaining that statutes of limitations do not apply in causes of action which arise out of governmental functions. The construction of a school building was seen as incidental to a state's overall duty to provide public education, while the operation of a school building was held to be a governmental function.

A year after a Tennessee product liability statute[92] was enacted an asbestos exception was added. Faced with a suit from a school district, an asbestos manufacturer moved for a summary judgment. The court denied the judgment holding that the vested rights doctrine did not bar claims against an asbestos manufacturer before those claims have been discovered.[93]

A North Dakota school district brought a negligence action against a manufacturer of asbestos-containing ceiling tiles.[94] After the jury found for the school district, the manufacturer moved for a judgment notwithstanding the verdict. The court denied the motion since the jury was not found to have acted in a manner that no reasonable jury could have behaved. Evidence established malice on the part of the manufacturer thus supporting an award of punitive damages to the school district.

A defective accelerator caused a school bus to crash into a building. In the suit that followed, neither the driver nor the Louisiana school board were found comparatively negligent.[95] Additionally, the school bus body manufacturer and the seller were not found at fault. A rubber mat which had been installed over the accelerator stop on the bus was not determined to have contributed to the misaligned accelerator panel, and thus was not a factor in the collision.

A product liability suit was brought by a Louisiana school employee who was injured while attempting to close a school lunch table.[96] The manufacturer of the table was found liable on the "failure to warn" or "dangerous design" theory. No assumption of risk was found by the court as the employee was not aware of the amount of force necessary to close the table.

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[91] Unified School Dist. No. 500 v. United States Gypsum Co., 719 F. Supp. 1003 (D. Kan. 1989). *See* Murray County Bd. of Educ. v. Wilbanks, 379 S.E.2d 559 (Ga. Ct. App. 1989). An employer was required to pay the claimant directly for medical expenses previously paid by the claimant's group insurance carriers.

[92] Tenn. Code Ann. § 29-28-103 (1980).

[93] Clarksville-Montgomery Bd. of Educ. v. United States Gypsum Co., 710 F. Supp. 1157 (M.D. Tenn. 1989). *See* West Haven School Dist. v. Owens-Corning Fiberglas, 721 F. Supp. 1547 (D. Conn. 1988). A school district was not shielded by sovereign immunity from a defendant's statute of limitations defense in an asbestos case.

[94] Hebron Pub. School Dist. v. United States Gypsum Co., 723 F. Supp. 416 (D.N.D. 1989).

[95] Foster v. Craig Equip. Co., 550 So. 2d 818 (La. Ct. App. 1989).

After a Louisiana truck driver, owner, and insurers were found liable for negligence in a collision with a school bus they filed a third-party action alleging negligent design and manufacture of the bus.[97] While the defendants admitted fault for the collision, they did not feel they were 100% responsible for the injuries sustained in the accident. They contended that had there been seat belts the injuries would have been less severe. In dismissing the third-party claim, the court held the seat beltless bus legally safe under prevailing statutes. The court added that it would be improper for a court to usurp a legislature's regulatory function where the legislature had clearly considered the various options and possibilities.

CONSTRUCTION CONTRACTS

A contractor brought a breach of contract action against an Alaskan school district concerning the completion date for several schools.[98] At trial the contractor produced evidence of a pre-bid conference in which the school district allowed a completion date up to eleven months later than the contracted date. After the work began, the district pressured the contractor to complete the work on schedule. The contractor sought compensation for the costs resulting from an unwarranted acceleration. The trial court's finding for the contractor was reversed by the state supreme court. Parol evidence was deemed inadmissible as an enforceable promise by the school district.

A general contractor who agreed to build a high school for a Colorado school district subcontracted with another firm for electrical work. That firm ordered supplies from an electrical supplier. After the general contractor terminated its agreement with the subcontractor, the subcontractor asserted a claim with the school district for supplies used in building the high school. The general contractor brought suit for the interest on the funds which were withheld by the school district to meet the subcontractor's claims. The court held the school district was entitled to the interest because its benefit was not conferred by the contractor, but rather by statutory mandate.[99]

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[96] Strain v. Mitchell Mfr. Co., 534 So. 2d 1385 (La. Ct. App. 1988).

[97] Brown v. Landry, 552 So. 2d 1299 (La. Ct. App. 1989).

[98] Alaska Diversified Contractors v. Lower Kuskokwim School Dist., 778 P.2d 581 (Alaska 1989). The interpretation of contract language was at issue in Elkhart Community School Corp. v. Mills, 546 N.E.2d 854 (Ind. Ct. App. 1989). A school corporation was not found to have breached contract for the sale of a school building where the purchaser had prior notice of the presence of asbestos.

A New York school district brought an action for negligence and professional malpractice against an architectural firm and its consulting engineers.[100] The plaintiff sought compensation for expenses incurred due to the defendants' inaccurate report of serious structural weaknesses in a school annex. The court found for the school district asserting that the defendants could not have failed to be aware that the reports they furnished would be relied upon by the district. Therefore, a duty of diligence was owed and not provided.

The second lowest bidder on a school construction contract sued a Louisiana school board claiming a violation of public contracts law.[101] While not disputing that another company had submitted a lower bid, exception was made to preconditions attached to the bid requiring the district to pay monies owed before work would be undertaken at the quoted price. In finding for the defendant, the trial court determined that the contract was substantially completed and noted that the school board would have been faced with paying the entire contract price to the company which received the bid, and additional profit to a company which only submitted a bid and filed suit for damages. The decision was reversed on appeal. Statutory bidding requirements were found to have been violated, therefore the fact that the lowest bidder had been paid for its work did not preclude a damages award for the next lowest bidder.

An Alabama statute[102] allows a board of education to accept a bid for personal property from a resident bidder if it is no more than 3% above the lowest bid from a responsible outside bidder. The Supreme Court of Alabama, when asked to interpret the statute, held that a roof in the process of erection is a part of the realty and therefore not personal property. Thus, the action brought by the lowest bidder was successful as the statute was not held to apply to the reroofing contract.[103]

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[99] Elliott Elec. Supply Co. v. Adolfson & Peterson Inc., 765 P.2d 1079 (Colo. Ct. App. 1988).

[100] Ossining Union Free School Dist. v. Anderson, 541 N.Y.S.2d 335 (1989).

[101] Airline Constr. Co. v. Ascension Parish School Bd., 549 So. 2d 1240 (La. Ct. App. 1989). *See* State *ex rel.* Page v. Reorganized School Dist. R-VI, 765 S.W. 2d 317 (Mo. Ct. App. 1989). A school board was not required to award a construction contract to the lowest bidder. In Bil Jim Constr. Co. Inc. v. Manchester Township Bd. of Educ., 566 A.2d 585 (N.J. Super. Ct. Law Div. 1989) the low bidder for construction of a school's tennis courts successfully reopened the bidding where the court found more detailed construction specifications were required.

[102] Ala. Code § 41-16-50(a) (1975).

The low bidder on a Massachusetts school construction contract brought an action for injunctive relief after its bid was rejected for failure to comply with minority and women business enterprise submission requirements.[104] The court denied relief, holding that the city had the discretion to reject the bid, even though it failed to include specific space on its bid form for women and minority certification data.

Due to a clerical error, a New York construction company submitted a bid on a school contract which was nearly $800,000 lower than intended. Although the school district was informed of the mistake when it was discovered, the board did not respond but rather accepted the bid. Recognizing that the company had acted in good faith, the court found for the construction company in its suit for equitable reformation of the contract.[105]

A Louisiana school board brought suit against a contractor and architect alleging a breach of standard of care in the designing and resurfacing of two high school running tracks.[106] The court of appeals awarded $100,000 to the school board reflecting the amount expert testimony indicated would be necessary to repair defects in the tracks. The architect's plans failed to require the tracks and track bases to be repaired prior to the resurfacing, and the architect failed to stop the work and investigate soft areas.

A New York school district brought an action against a roofing material supplier for damages incurred by a refusal to repair leaks in a school roof.[107] In finding for the school district the court held that the Uniform Commercial Code's implied warranty of fitness applied to the transaction between the school district and the supplier. Additionally, the school district's damages were not limited to expenditures made by the district to repair the leaks.

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[103] Tin Man Roofing Co. v. Birmingham Bd. of Educ., 536 So. 2d 1383 (Ala. 1988).

[104] Peabody Constr. Co. v. City of Boston, 546 N.E.2d 898 (Mass. App. Ct. 1989).

[105] Iversen Constr. Corp. v. Palmyra-Macedon Cent. School Dist., 539 N.Y.S.2d 858 (Sup. Ct. 1989).

[106] Terrebonne Parish School Bd. v. D & O Contractors, Inc., 545 So. 2d 588 (La. Ct. App. 1989). *See* Rome Gen. Contracting Co. v. Board of Educ. of N.Y.. A contractor was found in default for failure to install window guards at a high school. However, in Prichard Bros. Inc. v. Grady Co., 436 N.W.2d 460 (Minn. Ct. App. 1989), an architect was determined not to be an agent of a school district with regards to his negligence.

[107] Board of Educ. v. Celotex Corp., 542 N.Y.S.2d 671 (App. Div. 1989). In E.C. Goldman Inc. v. A/R/C Assocs. Inc., 543 So. 2d 1268 (Fla. Dist. Ct. App. 1989) experts hired by a school board to inspect a roof were not held liable to a roofing subcontractor for negligence in the report they filed which recommended the board not accept the roof. In Board of Educ. v. Sergeant, 539 N.Y.S.2d 814 (App. Div. 1989) a school district was unable to show proof of intent as required to state a cause of action for fraud involving an architect's concealment of a roofing contractor's nonperformance.

CONSTITUTIONAL TORTS

Student Initiated Cases

A New York elementary student brought a section 1983 action against school officials to recover for failure to prevent continuing attacks and abuse by other students.[108] The defendants asked for a dismissal of the action. In denying the motion, the district court explained that for the claim to be cognizable it must contain two elements. First, the conduct complained of must have been committed by a person acting under color of state law. Second, the defendant's conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the United States Constitution. In his complaint, the plaintiff alleged that the acts and omissions were all done by the defendants under existing New York State and county statutes, ordinances, regulations, customs, and usages. This met the first test for section 1983 liability. The court found the second test to have been met as well. While a single act of ordinary negligence may not form the basis of a civil rights claim, the allegation of seventeen separate incidents was found to rise to the level of deliberate indifference to an affirmative duty.

The issue of qualified immunity for a principal and assistant principal was settled in a Pennsylvania case which was remanded from the Supreme Court.[109] A female member of a high school band brought the action for injuries arising from sexual assaults by the band's director.[110] The Third Circuit Court of Appeals found that the student could maintain a civil rights action against the school officials for failing to take action on complaints of sexual misconduct which caused the student constitutional harm. Commenting on the ten-year period from the time of the abuse, the court remanded the case and was hopeful of an expeditious conclusion.

A Missouri teacher entered her classroom and found some students fighting. She picked up a plastic baseball bat and began hitting the students. The students brought a civil rights action against the school district claiming a failure to adequately monitor and supervise the teacher.[111] The court denied the district's motion to dismiss the action or, in the alternative, grant a summary judgment. In ordering the case for trial, the court cited the district's knowledge of the teacher's prior violations of the corporal punishment policy. The court explained that the school district's passivity in dealing with the teacher could constitute a section 1983 violation.

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[108] Pagano v. Massapequa Pub. Schools, 714 F. Supp. 641 (E.D.N.Y. 1989). In Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989), a civil rights action against a school district was barred by the common-law sovereign immunity available under state law.

[109] Smith v. Stoneking, 109 S. Ct. 1333 (1989).

[110] Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3d Cir. 1989).

A nine-year old Kentucky student asserted that her substantive due process rights were violated when she was paddled a total of seven times over a thirty-minute period. The court found that, although the student was bruised by the spanking, she was not injured to a point which would "shock the conscience"[112] of the court. While the number of swats may have been excessive, and amounted to a violation of state tort law, they were not found to constitute a violation of the student's rights to substantive due process.[113]

The violation of a Georgia student's right to be let alone by other people was examined in a case where a student alleged she was photographed against her will by a teacher.[114] She further alleged assault and battery claiming the teacher touched her wrists and hair while ordering her into positions to photograph her decoratively painted fingernails. The court found the defendant teacher, board of education, and superintendent were not liable for an invasion of privacy. No fundamental right was found which if violated would be subject to redress under section 1983. Questions of fact as to whether the student consented or invited the touching of her person precluded summary judgment on the assault and battery issue for the teacher. The board and superintendent were found immune on the assault and battery charge.

The mother of a Texas high school student brought an action for damages as a result of injuries her son sustained while in a woodworking class.[115] She charged that the school district's negligence stated a claim for deprivation of her son's rights under the fourteenth amendment. The court denied her claim as the due process clause is not violated merely by the negligent acts of an official.

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[111] Turley v. School Dist. of Kan. City, Mo., 713 F. Supp. 331 (W.D. Mo. 1989).

[112] Rochin v. California, 342 U.S. 165 (1952).

[113] Brown v. Johnson, 710 F. Supp. 183 (E.D. Ky. 1989).

[114] Jarrett v. Butts, 379 S.E.2d 583 (Ga. Ct. App. 1989).

[115] Burke v. Austin Indep. School Dist., 709 F. Supp. 120 (W.D. Tex. 1989). *See* Grubbs v. Aldine Indep. School Dist., 709 F. Supp. 127 (S.D. Tex. 1989). School district could not be held liable in a civil rights action for a student injured by a table saw during shop class.

Even if gross negligence were shown, an abuse of power made possible under the authority of state law must be proven. The mother's allegations failed to meet this test.

Employee Initiated Cases

An Illinois librarian brought an action against the school board and superintendent alleging her denial of "selected status" and transfer to another school were in retaliation for comments she made about the school system.[116] In response to a reporter's questions, the librarian had discussed problems relating to teaching in an inner-city environment and had talked about some positive aspects of teaching. The court found her statements constitutionally protected and the motivating factor in decisions regarding her status and transfer. The teacher was found entitled to compensatory damages for emotional distress, humiliation, and injury to her reputation, although the school board and superintendent were found immune from liability for punitive damages.

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[116] Thompson v. Board of Educ. of City of Chicago, 711 F. Supp. 394 (N.D. Ill. 1989).

6

SPORTS

Linda A. Sharp

- Introduction / 156
- Eligibility / 156
  - Discipline / 156
  - Age / 157
  - Limitations on Years of Eligibility / 157
  - Transfer / 158
  - Outside Participation / 158
  - Drug Testing / 159
- Equality of Programs / 159
  - Handicapped / 159
- Enforcement of Rules / 160
- Tort / 160
  - Intentional / 160
    - Reckless Misconduct / 160
    - Assault / 161
  - Negligence / 161
    - Participants / 161
    - Spectators / 165
- Employment / 166
  - Adverse Employment Decisions / 166
    - Refusal to Renew Coaching Contract / 166
    - Resignation / 166
  - Contract Disputes / 167
  - Collective Bargaining / 168
  - Unemployment Compensation / 169
  - Discrimination / 169
    - Race / 169
    - Sex / 170
- Miscellaneous / 170
  - Taxation / 170
  - Public Records / 171
  - Licensing / 171
  - First Amendment / 172

INTRODUCTION

This Chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic associations, and booster organizations. However, no case law is discussed which pertains to physical education instruction or intramural participation.

ELIGIBILITY

This section contains eight cases: one involved a student who was ineligible to participate because of misconduct; one was ruled ineligible because he exceeded the age restriction; one was ineligible because he exceeded the limitation on years of eligibility; two students found transfer rules objectionable; one questioned the restriction on outside participation; and two cases dealt with the issue of drug testing as a prerequisite to athletic participation.

Discipline

In a case from New Jersey, a high school football player was suspended from participating in extracurricular activities for sixty days and was put on academic suspension for ten days. He was given a *Goss* hearing for the academic suspension. His admitted offense was smoking marijuana and drinking beer on school property. The district court granted summary judgment for the school district as it held that there is no constitutionally protected property interest in playing football.[1] The Third Circuit Court of Appeals affirmed this decision on the basis that the hearing given to the student in regard to the ten day academic suspension was sufficient. Just because the sixty day athletic suspension was not mentioned specifically in the hearing does not mean that such a penalty cannot be imposed. The court found that there is no requirement in *Goss*[2] that a person know, at the time of the hearing, all the penalties that could conceivably be imposed.[3]

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[1] *See* The Yearbook of Education Law 1989 at 156, Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988).

[2] Goss v. Lopez, 419 U.S. 565 (1975).

[3] Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989).

Age

A Michigan student transferred from a specialized institution for students with emotional and learning disabilities to a parochial high school. The high school athletic association rules on transfer prevented him from playing in interscholastic competition in the first academic year after transfer. The next season the student made the team as a nonstarter. Before the following season, the student was declared ineligible because he would exceed the age restriction. The Michigan High School Athletic Association (MHSAA) denied his petition for a waiver of this restriction.

In the beginning of the academic year, the student was found eligible for special education services. The individualized education plan recommended that the student participate in athletics to help his self-esteem. The student's parents sought an injunction to prevent the MHSAA from enforcing the age regulation against the student. The trial court issued a temporary restraining order and the student played in a number of basketball games. The MHSAA intended to sanction the school for allowing the student to participate. A MHSAA regulation allows sanctions to be taken against a school even though the school had permitted the participation because of a court order. The Michigan Court of Appeals found that this regulation was arbitrary, unreasonable, and unlawful. The regulation is a manifest abuse of discretion since its obvious intent is to chill any challenges to the MHSAA regulations.[4]

Limitation of Years of Eligibility

In a case out of Arizona, a student challenged the state interscholastic association's rule which denied the student an additional year of eligibility. The student believed that he should fall within that part of the rule which allows an additional year of eligibility for "illness." The student's "illness" related to incarceration in a juvenile institution after he committed burglary to get money to support his drug addiction. The Arizona Court of Appeals found that just as addiction does not excuse criminal acts neither does it make incarceration an absence due to "illness."[5] However, the Arizona Supreme Court came to a contrary resolution since the student chose to be incarcerated in order to undergo rehabilitation for his drug and alcohol dependency. His absence from school, therefore, was related to an illness. The Court of Appeals' decision was vacated.[6]

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[4] Cardinal Mooney High School v. Michigan High School Athletic Ass'n, 445 N.W.2d 483 (Mich. Ct. App. 1989).

[5] *See* The Yearbook of Education Law 1989 at 158, Clay v. Arizona Interscholastic Ass'n, Inc., 757 P.2d 1059 (Ariz. Ct. App. 1988).

Transfer

In a South Dakota case, a student-athlete transferred from a public high school to a bible academy. The bible academy was quite a distance away from his home and he resided in a dormitory at the school. Since there was no change in the parents' residence, the student was ineligible to participate in athletics for one year at the bible academy under the high school athletic association transfer rule. The student's request for a waiver of the rule was denied since he did not fit into the "hardship" exception. Although the trial court found the transfer rule to be unconstitutional, the South Dakota Supreme Court disagreed. The transfer rule is rationally related to the goal of discouraging school switching by athletes and preventing the recruiting of athletes by member schools. Furthermore, no due process is required because a student's participation in athletics is not a property interest.[7]

The parents of a handicapped student sought a preliminary injunction under the Education of the Handicapped Act (EHA) restraining the secondary school athletic association from applying a transfer rule. The student had transferred from a parochial school to a public high school and had been found, after the transfer, to have a learning disability. The Sixth Circuit Court of Appeals dismissed the suit because the parents had not exhausted the available administrative remedies for resolving disputes about a handicapped child's educational program.[8]

Outside Participation

A federal district court in Ohio was asked to decide the constitutionality of a high school athletic association rule which prohibited soccer players from participating in both spring independent soccer and fall interscholastic soccer. The plaintiff alleged that the rule violated his right of association, due process rights, and equal protection rights. In regard to the right of association, the court held that participation on an independent soccer team is not the type of private or expressive association which is constitutionally protected.

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[6] Clay v. Arizona Interscholastic Ass'n, Inc., 779 P.2d 349 (Ariz. 1989).

[7] Simkins v. South Dakota High School Activities Ass'n, 434 N.W.2d 367 (S.D. 1989).

[8] Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989).

No due process rights are necessary since participation in interscholastic athletics is a privilege. Lastly, there is no suspect classification involved and there is a rational basis to a rule which allows outside participation by athletes involved in individual sports but forbids outside participation by athletes in team sports such as soccer. Those involved in team sports could gain a distinct competitive advantage by playing "as a team" on a year round basis.[9]

Drug Testing

A track athlete at a private university brought an action against the university and the NCAA challenging the random drug testing program at the school. The action was filed in state court and the NCAA filed a petition for removal to federal court. The federal district court granted the student-athlete's motion for remand to the state court, given that there was no federal question.[10] The action was based on the Massachusetts Privacy Act and the Massachusetts Civil Rights Act.

In a continuation of this case in state court, the Supreme Judicial Court of Massachusetts found that the drug testing program did not violate the privacy statute which guarantees a right against unreasonable, substantial, or serious interference with privacy. This Massachusetts' statute has been used primarily in cases which dealt with the public dissemination of information. Since the plaintiff had not alleged that there would be public disclosure of confidential information, there was no statutory invasion of privacy.[11]

EQUALITY OF PROGRAMS

Handicapped

In a federal district court in Illinois, a handicapped student brought a section 1983 action. The student was in a wheelchair and asked the school to allow him to compete against able-bodied athletes on an equal basis in track and field. The school denied his request so the plaintiff requested a Level I hearing under the Education of Handicapped Act (EHA). The hearing officer found that the plaintiff must be allowed to participate against able-bodied athletes if he could safely do so. A multidisciplinary conference was held to address the question of whether the student could safely participate. Although the MDC participants came from a variety of disciplines none of them had any real knowledge of athletics or, more specifically, wheelchair athletics. The district court, therefore, held that the MDC was not in compliance with EHA requirements and thus violated section 1983.[12]

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[9] Burrows v. Ohio High School Athletic Ass'n, 712 F. Supp. 620 (S.D. Ohio 1988).

[10] Bally v. National Collegiate Athletic Ass'n, 707 F. Supp. 57 (D. Mass. 1988).

[11] Bally v. Northeastern Univ., 532 N.E.2d 49 (Mass. 1989).

ENFORCEMENT OF RULES

In a New York case, a board of education and a superintendent brought an action against a nonprofit, voluntary, unincorporated association of school superintendents (Council). The Council was responsible for the formation of interscholastic athletic conferences for the public school districts of certain counties. The Council realigned the conferences and the plaintiffs objected to the league in which their school was now placed on the basis that the realignment would cause excessive travel time and increased transportation costs. The plaintiffs asked to be placed into a different league. The Supreme Court dismissed the action as it held that the primary jurisdiction for a dispute of this nature is vested in the state Commissioner of Education.[13]

TORT

In 1989 there were thirteen tort cases dealing with sport. Of these cases, two were intentional torts (i.e., reckless misconduct and assault). Of the eleven negligence cases, ten dealt with participants and one case concerned a spectator.

Intentional

Reckless Misconduct. A college ice hockey player sustained severe internal injuries after a player on the opposing team "butt-ended" the plaintiff in the abdomen. After a face-off the opposing player drove the end of his hockey stick into the plaintiff's midsection, clearly a violation of a safety rule. The trial court entered judgment for the defendant on the basis that, although the defendant violated a safety rule, he did not act willfully, wantonly, or recklessly in doing so. The Supreme Judicial Court of Massachusetts agreed with the trial court's interpretation of this novel question in this jurisdiction. More than a mere breach of a safety rule is required to hold a participant responsible to another participant. There must be a reckless disregard of safety in order to impose liability in such a situation.[14]

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[12] Hollenbeck v. Board of Educ. of Rochelle Township, 699 F. Supp. 658 (N.D. Ill. 1988).

[13] Board of Educ. v. Anderson, 532 N.Y.S.2d 330 (Sup. Ct. 1988).

Assault. A collegiate football player alleged that his coach assaulted him during a game. In a course of litigation which has spanned almost a decade, the plaintiff was unsuccessful in the suit brought in state court.[15] However, he also brought litigation in federal court under sections 1983 and 1985. The latter claim related to charges that witnesses were intimidated from truthfully testifying. The Ninth Circuit Court of Appeals dealt with the question of whether a compensable injury existed under section 1985. This cause of action requires that a claimant show that a conspiracy to intimidate witnesses hampered the claimant's ability to present an effective case in federal court. The plaintiff was unable to meet this showing because there had been no evidentiary hearing in federal court. Since no testimony had ever been taken in a federal forum, the plaintiff's claim must fail.[16]

Negligence

Participants. The defendant medical school sponsored an annual road race for faculty and students. The race was organized by the students with the full knowledge of the school's administration. The race was only 2.5 miles in length; however, the race was run on a tropical island in the late afternoon. The temperature was approximately eighty-five degrees and the humidity was high. A student participant collapsed at the finish line and subsequently died. This student was twenty-five years old and was seventy-five pounds overweight. Also, he suffered from high blood pressure and took an amphetamine before the race. The federal district court found no negligence on the part of the medical school. It had no duty to supervise this event, and even if it did, the provision of water, ice, and wet towels at the end of the race were sufficient. There was no necessity with a race of this short distance to have a doctor present. Furthermore, the decedent assumed the risk. He was charged with the knowledge of his own medical condition and of the tropical conditions of the island. By entering the race, he assumed the risk of thermal injury.[17]

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[14] Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989).

[15] *See* The Yearbook of Education Law 1987 at 183, Rutledge v. Arizona Bd. of Regents, 711 P.2d 1207 (Ariz. Ct. App. 1985).

[16] Rutledge v. Arizona Bd. of Regents, 859 F.2d 732 (9th Cir. 1988).

In a New York case, a high school girl was hurt during a game of flag football during "Spirit Week." The plaintiff alleged negligence in regard to supervision and instruction. The injured student collided with an opposing player as the opponent reached across the plaintiff's body to grab the flag. There was no evidence to support a finding of negligence since the sport was not a game of physical contact.[18]

In another New York case involving touch football, a college freshman was injured during a recreation period at a state university. The plaintiff intercepted a pass and, while trying to evade his pursuers, turned his foot in a rut, sustaining a knee injury. The Supreme Court Appellate Division found that the defendant university had met its duty of care in inspecting and maintaining the field. The duty is not to provide a perfectly level field but to use reasonable care to prevent injury. Also, there was a question of proximate cause since the knee injury could have just as easily been caused by an "evasive move" as by a rut on the field.[19]

Another football injury occurred in Idaho. A student suffered a broken leg as he tripped over sprinkler pipes on the school grounds during an informal football game held a few minutes before school began. The trial court granted summary judgment for the defendant school district as it held that the recreational use statute was applicable in this situation and thus, no duty of care was owed by the school. The Idaho Supreme Court disagreed with this interpretation of the law. The recreational use statute is not applicable because of the student's relationship to the landowner (i.e., the student is entitled to the protection of the school district). Here, we do not have just any member of the "public" using this land. Rather, the student was at the site engaged in a legitimate activity prior to classes. There is a genuine issue of material fact regarding whether the school district failed to provide proper supervision. Summary judgment was reversed.[20]

There are two more football cases which deal with injuries sustained in interscholastic competition. In the first case, from Louisiana, an injured high school football player brought suit against the Louisiana High School Athletic Association. The player attempted to hold the association responsible for the alleged negligence of the game officials in allowing violent and unsportsmanlike conduct to continue unchecked. As a result of this excessively rough play, the student suffered a serious neck injury. The issue is whether the referees can be considered to be the agents of the LHSAA. Although the LHSAA gives a rules test and registers officials, it does not "control" officials to the degree that officials may be considered agents of the LHSAA. Also, the LHSAA did not have any knowledge that this particular school was continually engaging in unsportsmanlike behavior and therefore, had no duty to intervene.[21]

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[17] Gehling v. St. George's Univ. School of Medicine, 705 F. Supp. 761 (E.D.N.Y. 1989).

[18] Buckvar v. Syosset Cent. School Dist., 538 N.Y.S.2d 563 (App. Div. 1989).

[19] Drew v. State, 536 N.Y.S.2d 252 (App. Div. 1989).

[20] Bauer v. Minidoka School Dist. No. 331, 778 P.2d 336 (Idaho 1989).

The final football case had to do with the question of mismatched participants. The team on which the injured student participated had a very poor record. The principal of the school had requested that his team be assigned to a less competitive division because it was clear that his football team was outmatched. However, the league supervisor denied the request. On the day of the injury, the student's team was playing a vastly superior team. The principal and the coach had discussed refusing to play this game because it had a high risk of injury. Nevertheless, the game was played, and the student, who had played virtually every down because of a lack of qualified replacements, was injured near the end of the first half. The student prevailed at the state supreme court level. Upon appeal, the lower court decision was affirmed. The school unreasonably enhanced the risk of injury to the student by playing this contest which clearly had a high risk of injury.[22] The New York Court of Appeals disagreed. First, the trial court erroneously instructed the jury that the school board owed the standard of care of a prudent parent, a duty of care which was beyond ordinary reasonable care. Second, the student assumed the risk of injury because he was not under an "inherent compulsion" to play (i.e., he was not able to show that he had no choice but to follow the coach's direction to play despite his concern over enhanced risk factors).[23]

In a case out of Louisiana, an athletic team manager sustained a severe leg injury, necessitating the amputation of his leg. The fourteen year old student was in the process of using an extractor, a powerful piece of equipment which has a spin cycle similar to a washing machine. He was in a hurry to get the uniforms ready for a game and became distressed when the extractor did not stop spinning after it had been turned off. The student attempted to stop the machine by putting his hand on a stop lever at the side of the extractor. However, the machine continued to spin, so the student climbed upon the extractor to use his foot on the lever. His leg, however, ended up in the machine. This student had been warned never to reach into the machine while it was still spinning and he knew that this equipment was capable of causing severe injuries. The trial court denied recovery to the student on the basis of contributory negligence. Initially, the Louisiana Court of Appeals agreed with this result. However, upon rehearing, the court found that a minor labor law applied which prohibited minors under the age of sixteen from working "in, or about, or in connection with power-driven machinery." Although the school-student relationship was not an employer-employee situation, the court found that the statute was applicable because the activity was fundamentally voluntary and extracurricular. Furthermore, since the statute was applicable, the student's actions did not bar recovery. The statute contemplates that a minor might not be able to act prudently in all situations which involve the use of power-driven machinery. The matter was reversed and a judgment of $521,600 was rendered.[24]

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[21] Harvey v. Ouachita Parish School Bd., 545 So. 2d 1241 (La. Ct. App. 1989).

[22] *See* The Yearbook of Education Law 1989 at 164, Benitez v. New York City Bd. of Educ., 530 N.Y.S.2d 825 (App. Div. 1988).

[23] Benitez v. New York City Bd. of Educ., 543 N.Y.S.2d 29 (1989).

A high school wrestler sustained multiple lacerations when his hand went through a window in a school hallway. The hallway was used for sprinting drills. At the trial level, the defendant's motion for summary judgment was granted on the basis of immunity. The Pennsylvania Commonwealth Court, however, reversed because the claim alleges a defective condition of real property, an exception to immunity. Summary judgment is not appropriate because there is a genuine question as to whether the failure to install shatterproof glass is a dangerous condition (defect) because the realty was regularly used for wrestling practice.[25]

In a case out of Tennessee, a mentally handicapped student was injured in a YMCA pool as he trained for the Special Olympics. The student, who was twenty years old and severely retarded, went with his special education class to the YMCA pool. The training sessions were supervised by a teacher, a teacher's aide, and a YMCA lifeguard. At the end of the session, the student was found lying on the floor of the pool. After being resuscitated by the lifeguard, the student was admitted to the hospital. The teacher admitted that she was working with the student at the end of the session, that she told him to get out of the pool, and that she did not actually see him get out of the pool. The trial court rendered judgment for the defendants. The Tennessee Court of Appeals found that the evidence did not support such a judgment and reversed. Also, in regard to the waiver which was signed by the student's mother, the court found that, although the exculpatory clause was not prohibited by public policy, the mother was unable to waive the rights of her incompetent son.[26]

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[24] Byrd v. Bossier Parish School Bd., 543 So. 2d 35 (La. Ct. App. 1989).

[25] Gump v. Chartiers-Houston School Dist., 558 A.2d 589 (Pa. Commw. Ct. 1989).

A cheerleader sued the school district for spinal injuries sustained as she fell during a free period at a summer cheerleading camp. The cheerleaders were practicing a cheer which involved a pyramid formation which was not a routine learned at the camp. The cheerleading camp was operated by an entity with no connection to the school district. The funds to attend were raised by the cheerleaders and the only active participation by the school district involved the provision of a bus to transport the girls to the camp. The cheerleader advisor attended the camp at her own expense and with no contractual obligation to do so. The trial court granted summary judgment for the school district and the Montana Supreme Court affirmed. Under the facts of this case, there was no duty owed by the school district to the injured student.[27]

Spectators. In a Pennsylvania case, a spectator, who was waiting in a refreshment line at halftime of an interscholastic football game, was knocked to the ground. She was hit by a football player who was leading his team from the visitor's lockerroom back to the field. The plaintiff alleged negligence by the player and by the school district in placing the concession stand in close proximity to the locker room. In regard to the player, the Pennsylvania Commonwealth Court found that he was immune. Although the student is not an employee of the school district, the statutory definition of employee is broad enough to encompass a high school athlete who is acting "on behalf of the school district" in playing football. Since his actions were within the scope of his duties, he is immune. In regard to the alleged negligence of the school district, the "misplacement" of a lockerroom is not a defect in the real property; therefore, the real property exception to immunity is inapplicable. Summary judgment for the defendants was affirmed.[28]

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[26] Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

[27] Rollins v. Blair, 767 P.2d 328 (Mont. 1989).

[28] Wilson v. Miladin, 553 A.2d 535 (Pa. Commw. Ct. 1989).

EMPLOYMENT

Ten cases which dealt with employment issues were decided in 1989. Three of those cases involved adverse employment decisions, two concerned contract disputes, one related to a collective bargaining issue, one case dealt with unemployment compensation, two cases pertained to race discrimination, and one case involved a sex discrimination claim.

Adverse Employment Decisions

Refusal to Renew Coaching Contract. In a case out of North Dakota, the contract of a girls' volleyball coach was not renewed. Also, the school board refused to renew the contract of the head boys' basketball coach/athletic director. In regard to the latter position, the athletic director had his teaching salary reduced by one-seventh. The plaintiffs filed for a writ of mandamus to require the school board to follow statutory nonrenewal procedures. The Supreme Court of North Dakota held that the statutory nonrenewal procedures were clearly inapplicable to the coaching assignments because they were extracurricular. However, in regard to the athletic director position, the nonrenewal procedures must be followed since those responsibilities were intertwined with curricular duties. As support for this stance, the court noted the reduction in teaching salary which accompanied the removal of the athletic director assignment.[29]

In an Oklahoma case, a tenured teacher was relieved of his coaching assignment. This particular school district had entered into a collective bargaining agreement which required that the nonrenewal of coaching assignments be subject to binding arbitration. The teacher brought an action in mandamus to require the arbitration procedure to be enforced. The Oklahoma Supreme Court found that the arbitration clause conflicted with the legislative mandate that a decision regarding the extra-duty assignments of a teacher is not bargainable. The assignments are a policy determination of the board and it is beyond the power of the board to bind itself to arbitrate in such a situation. The arbitration clause cannot supersede the nondelegable and exclusive authority to fix teachers' duties.[30]

Resignation. Since 1977, a high school physical education teacher had performed extensive extracurricular duties. She coached volleyball for ten seasons and softball for four years. She also served as a class sponsor four times and monitored the cheerleading squad and pep club on two occasions. For the 1986-87 school year this teacher was again assigned to coach both volleyball and softball. She attempted to resign her volleyball coaching position on the basis that these extensive assignments were imposing a hardship on her family life. The school district refused to accept her resignation. The trial court found that the school district abused its discretion in refusing to allow the teacher to resign one of the coaching positions. The Illinois Court of Appeals affirmed this decision as it held that the school district cannot assign someone to extra duties which are unreasonable or overly burdensome. In view of this teacher's total work load, it was unreasonable not to allow her to resign from the volleyball coaching assignment.[31]

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[29] Coles v. Glenburn Pub. School Dist. No. 26, 436 N.W.2d 262 (N.D. 1989).

[30] Mindemann v. Independent School Dist. No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989).

Contract Disputes

The defendant operated the Illini Sports Network which broadcast the University of Illinois intercollegiate athletic events. In May 1985, the defendant orally agreed that the plaintiff would sell advertising time on the Illini Sports Network for the 1985-86 and 1986-87 athletic seasons. The plaintiff was responsible for collecting payments from the advertisers and then turning the funds over to the defendant after deducting a 15% commission. In February 1986 the defendant terminated the agreement. At that time, the plaintiff had sold all the advertising for the 1985-86 season and had been selling the advertising for the 1986-87 season since November 1985. After the plaintiff sued the defendant for breach of contract the defendant moved for summary judgment arguing for the applicability of the Illinois statute of frauds provision that a contract which is not to be performed within one year from the making thereof is unenforceable unless it is in writing. The federal district denied the motion for summary judgment because the performance of all duties under the contract *could* have been completed within one year.[32]

In a Colorado case, a junior high school basketball coach sued the high school coach and the school district for defamation, outrageous conduct, invasion of privacy, and breach of contract after he lost his employment. The plaintiff worked as an assistant boys' basketball coach at the junior high school. During the summer of 1985, the head basketball coach at the high school asked the plaintiff to serve as the assistant coach at the high school for the next season. The plaintiff accepted but his employment was never approved by the school board. Shortly thereafter, the high school coach confronted the plaintiff about a rumor that he had been implicated in a child molesting incident a number of years ago. The plaintiff chose to resign or the high school coach would have fired him. The plaintiff also lost his position at the junior high school after the head coach expressed concern that the plaintiff have no contact with his son. The head coach told others that the plaintiff was a "child molester" and showed court records which indicated that the plaintiff had plead *nolo contendere* to a charge of attempted assault on a child under the age of sixteen. At the trial court, summary judgment for the defendants was granted. The Colorado Court of Appeals affirmed. There was no defamation because the statements made were substantially true. The plaintiff could not prevail on a cause of action based on outrageous conduct because the defendants' conduct was not atrocious and utterly intolerable. The invasion of privacy claim failed because the plaintiff's criminal records were public and they did not lose their public character through the passage of time. Finally, the power to employ a coach is given exclusively to the school board and this power cannot be delegated. The plaintiff is charged with the knowledge that he was not hired unless the school board had approved his appointment.[33]

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[31] Lewis v. Board of Educ. of N. Clay Community Unit School Dist. No. 25, 537 N.E.2d 435 (Ill. App. Ct. 1989).

[32] Sports/Media Sales Co. v. Rasmussen, 691 F. Supp. 156 (N.D. Ill. 1988).

Collective Bargaining

In Indiana, the Education Employment Relations Board decided that the athletic director, head football coach, and head basketball coach were supervisors, and thus, excluded from the bargaining unit. The plaintiff education association sought judicial review of this determination, which was upheld by the circuit court. In applying the applicable statutory language, the Indiana Court of Appeals held that a supervisor is one who has authority over school employees (who are defined as certificated persons). In Indiana, there is no absolute requirement that coaches be certificated. Therefore, sometimes the athletic director and head coaches may make hiring and promotion decisions regarding persons who are not "employees." The court held that *if* the athletic director and coaches supervise full-time certificated employees then they are to be considered supervisors under the statute.[34]

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[33] Lindemuth v. Jefferson County School Dist. R-1, 765 P.2d 1057 (Colo. Ct. App. 1988).

Unemployment Compensation

The plaintiff was employed as a teacher and coach. His coaching responsibilities were withdrawn but he continued to teach in the 1987-88 academic year. In March 1988 the superintendent recommended that the plaintiff resign. The plaintiff did so and then tried to collect unemployment benefits. The Supreme Court of North Dakota held that a resignation in anticipation of a discharge does not entitle the plaintiff to collect unemployment benefits.[35]

Discrimination

Race. In Texas, white and Hispanic football coaches brought a section 1983 action after they were reassigned from the varsity football team to the sophomore football team so that black coaches could be appointed to the varsity staff. The federal district court held that this reassignment violated the equal protection clause and plaintiffs' motion for summary judgment was granted. The defendant argued that its decision was constitutionally permissible to maintain racial integration among its coaching staffs. The court cited *City of Richmond v. J.A. Croson*[36] for the proposition that assertions of past societal discrimination are insufficient to justify the remedial use of race-based classifications. Once a school system is integrated, as is the case here, the prior discrimination has been cured and race-based classifications are no longer remedial of pre-unitary violations. Thus, the simple fact that the varsity team was 80% black yet had no black coaches was an insufficient justification for the plaintiffs' reassignments.[37]

In another race discrimination case which originated in Texas, a white coach, a minority at his school, brought a race discrimination suit. The Fifth Circuit Court of Appeals ruled that the plaintiff had established a prima facie case of discrimination. It also ruled that respondeat superior was inapplicable in a section 1981 claim to impose liability upon the school district.[38] The court denied the athletic director's and coach's motion for a rehearing thus reaffirming its position regarding respondeat superior.[39]

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[34] Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations Bd., 536 N.E.2d 563 (Ind. Ct. App. 1989).

[35] Six v. Job Serv. N.D., 443 N.W.2d 911 (N.D. 1989).

[36] City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

[37] Covington v. Beaumont Indep. School Dist., 714 F. Supp. 1402 (E.D. Tex. 1989).

[38] *See* The Yearbook of Education Law 1987 at 193, Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

The Supreme Court affirmed that portion of the appellate court's opinion regarding section 1981 liability. A municipality may not be held liable for its employees' violations of section 1981 under respondeat superior.[40] Express "action at law" under section 1983 provides the exclusive federal damages remedy for the violation of rights guaranteed by section 1981 when the alleged violation is by a state actor.[41]

Sex. In a case originating in Arkansas, a female academic coordinator for a university athletic department was discharged. She brought a title VII action which was not upheld by the federal district court.[42] The Eighth Circuit Court of Appeals affirmed the decision on the basis that the plaintiff had not produced credible evidence of discrimination. There were a number of problems in her work including the improper monitoring of eligibility and poor faculty relations. The reasons given by the university for her discharge were not a pretext for discrimination.[43]

MISCELLANEOUS

Taxation

A university brought an action seeking relief from real estate taxes under the statutory exemption for school property. The property in question consisted of nine outdoor tennis courts, a clubhouse, and locker rooms. The university-owned courts were leased to a private tennis club which paid an annual fee and maintained the courts. The university's use was limited to a fixed number of hours for use by physical education classes and the intercollegiate tennis teams. Other students paid fees to the tennis club to use the courts. Under Illinois law, a property used for more than one purpose must be used *primarily* for an exempt purpose. That was not the case here because the private club's use (a nonexempt use) exceeded the university's use for exempt purposes.[44]

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[39] *See* The Yearbook of Education Law 1989 at 171, Jett v. Dallas Indep. School Dist., 837 F.2d 1244 (5th Cir. 1988).

[40] Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).

[41] *Id.* at 2722.

[42] *See* The Yearbook of Education Law 1988 at 195, Gray v. University of Ark. at Fayetteville, 658 F. Supp. 709 (W.D. Ark. 1987).

[43] Gray v. University of Ark. at Fayetteville, 883 F.2d 1394 (8th Cir. 1989).

Public Records

In an Oregon case, a newspaper publisher brought an action under the public records law to have a school district divulge the names and addresses of coaches it hired as replacements during a strike. The replacement coaches had been promised that their personal data would be kept confidential. The Oregon Court of Appeals held that the names of the replacement coaches must be disclosed. Coaches in public schools are not anonymous nor are they entitled to be. Furthermore, just because names are in the personnel files does not mean that they become confidential information. A public body cannot make otherwise public information confidential by placing it in a personnel file. However, the addresses were submitted to the school district in confidence and may reasonably be considered information which is confidential. Therefore, the addresses were exempt from disclosure.[45]

The university coach of a women's basketball team resigned under rather curious circumstances. He resigned just a few months after signing a three year reappointment contract. Therefore, the publisher of the local newspaper sought disclosure of information regarding this incident under the Freedom of Access Act. The university submitted a settlement agreement which it had entered into with the coach for *in camera* review by the trial court. The court ordered disclosure of the entire agreement. The Supreme Judicial Court of Maine affirmed the judgment with the exception that one sentence relating to the coach's medical condition must be deleted before disclosure.[46]

Licensing

The University of North Carolina at Chapel Hill began a licensing program for its merchandise which bore the university name, symbols, and insignia. Much of the merchandise related to the athletic teams which are known as the "Tarheels." The university sued a local retail outlet for trademark infringement. The defendant argued that the university had abandoned its marks because it did not prosecute trademark infringers before 1982. The federal district court disagreed with the defendant's argument regarding abandonment. Furthermore, defendant's counterclaim under the Sherman Act was foreclosed because of sovereign immunity.[47]

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[44] De Paul Univ., Inc. v. Rosewell, 531 N.E.2d 884 (Ill. App. Ct. 1988).

[45] Guard Publishing Co. v. Lane County School Dist. No. 4J, 774 P.2d 494 (Or. Ct. App. 1989).

[46] Guy Gannett Publishing Co. v. University of Me., 555 A.2d 470 (Me. 1989).

First Amendment

A member of a school's marching band complained to the principal about the invocations delivered prior to the home football games. They were given by Protestant ministers and they were clearly prayers. The football games were school-sponsored and the games were played at a stadium owned by the school system. After the plaintiff complained, the school instituted an "equal access" plan whereby all school clubs could designate club members to give invocations or school staff members could seek to deliver an invocation. This plan was unsatisfactory to the plaintiff and he brought suit in federal district court. The district court held that the invocations were unconstitutional but that the "equal access" plan was constitutional on its face. The Eleventh Circuit Court of Appeals found that the "equal access" plan violated the establishment clause of the first amendment under *Lemon v. Kurtzman.*[48] There was no secular purpose for adopting the plan; it was express support for Protestant Christianity. Even if the plan was found to have a secular purpose, the invocation clearly conveyed a message that the school endorsed the religious invocation. The Circuit Court of Appeals did agree with the district court, however, that the invocations violated the establishment clause.[49]

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[47] Board of Governors v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989).

[48] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[49] Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989).

7

FINANCE

Patricia G. Anthony and

Bettye MacPhail-Wilcox

Introduction / 173
Public Funds for Private Schools / 174
Sources and Allocations of Public School Funds / 175
  State School Finance Programs / 175
  Local Funds for Education / 181
  Federal Funds for Education / 182
  School Fees / 183
School Tax Issues / 184
  Tuition / 184
  Tax Assessment and Collection / 185
  Use of School Tax Base Revenues / 187
  Tax Exemptions / 188
  Tax Deductions / 190
  Tax Revenue Disbursement / 190
  Bond Issuance / 190
  Delinquent School Taxes / 192

INTRODUCTION

There were three federal appellate decisions and one U.S. district court decision in the area of school finance. The appellate decisions ruled on issues regarding a state's role in financing a court-ordered desegregation plan, and the use of federal funds for vocational rehabilitation and title I programs. The district court decision concerned a school district's use of facilities owned by a Roman Catholic church to house elementary school classes.

The constitutionality of four states' school financing schemes was decided in those states' supreme courts. Additionally, another state supreme court ruled on the distribution of federal impact aid funds. State courts also litigated cases concerned with the constitutionality of loaning textbooks to nonpublic schools (specifically parochial schools), equal protection issues centering around the distribution of certain kinds of state funds, and the constitutionality of excess levies provisions.

School tax cases concerned the use of revenues for unused vacation pay and salaries of assistant tax assessors. There were challenges to bond issues, tax exemptions, tax deductions, and several tax delinquency cases. Other litigation dealt with the taxation of teacher contributions to retirement systems and the applicability of social security taxes to wages for school-related extra duties.

PUBLIC FUNDS FOR PRIVATE SCHOOLS

The United States District Court of Massachusetts granted injunctive relief to two elementary school students attending public school classes in a building owned and operated by the Roman Catholic Church.[1] In requiring the school district to reassign these students to another elementary school, the court agreed with the plaintiffs that probable establishment clause violations existed in the form of provisions of the lease, large crosses over the entrance to the school and the playground, flyers posted around the building announcing upcoming religious events, and the parish priest's habit of greeting the school children each morning. The court felt that such conditions relayed to students the message that "the public school and the Roman Catholic Church are closely linked; the Roman Catholic Church has a special status in our society; . . . members of other faiths are outsiders or guests; and the government favors and encourages religious belief rather than disbelief."[2]

Aside from impermissibly advancing the Roman Catholic faith over other religions, the court found that the lease fostered excessive entanglement between church and state, in that it stated that "[t]enant's use of the Premises shall at all times be consistent with the teachings of the Roman Catholic Church enunciated by the Holy Father and Bishops in communion with him."[3] Enumerating specific instances in which school board members had already deferred to church officials on school-related matters,[4] the court contended "that the lease and Bridgewater's conduct pursuant to it constitutes an impermissible delegation to, or sharing with, the Roman Catholic Church of the Town's responsibility to determine what is taught to its elementary school students."[5] The court granted injunctive relief, mandating that the school district must reassign the two students prior to the beginning of the 1989-90 school year, and set a date for future proceedings to determine the validity of alleged establishment clause violations.

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[1] Spacco v. Bridgewater School Dep't, 722 F. Supp. 834 (D. Mass. 1989).

[2] *Id.* at 842-3.

[3] *Id.* at 836.

[4] *Id.*

The Supreme Court of Nebraska upheld a lower court's decision that the lending of textbooks to private school students did not violate either the state constitution or the establishment clause of the first amendment.[6] At issue was the constitutionality of a statute delegating responsibility to school districts for loaning, upon individual request, textbooks to students attending nonpublic schools. Appellants claimed that the statute violated the establishment clause and Nebraska's state constitution which states that "[a]ppropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof. . . ."[7]

In finding that the statute met state constitutional constraints, the court reasoned that the books were being loaned to students, not to schools; therefore, there existed no appropriation of public funds to nonpublic schools. In regard to establishment clause violations, the court cited the controlling cases, *Meek v. Pittenger*,[8] and *Wolman v. Walter*,[9] in which the three-pronged test established in *Lemon v. Kurtzman*[10] was applied to similar textbook practices and upheld. Consequently the court ruled that the Nebraska statute did not violate the state constitution or the establishment clause.

SOURCES AND ALLOCATIONS OF PUBLIC SCHOOL FUNDS

State School Finance Programs

Four state supreme courts—Montana, Wisconsin, Texas, and Kentucky—issued opinions regarding the constitutionality of each state's public education financing system. West Virginia Supreme

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[5] *Id.* at 847.

[6] Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989).

[7] *Id.* at 809.

[8] 421 U.S. 349 (1975).

[9] 433 U.S. 229 (1977).

[10] 403 U.S. 602 (1971).

Court of Appeals issued an opinion concerning state constitutional excess levies provisions. Three decisions by New York appellate courts considered issues related to state supplemental aid, eligibility requirements for excellence in teaching set-aside grants, and the implementation of a statute reducing school district state educational aid. The Third District Appellate Court of Illinois ruled on school district actions seeking recomputation of state aid funds. Finally, the Eighth Circuit Court of Appeals determined the state of Missouri's obligation to fund interdistrict transfers for desegregation purposes.

The Supreme Court of Montana affirmed, but modified, a lower court ruling that the state's method of financing public education violated state constitutional provisions guaranteeing equal education opportunity.[11] Due to "unrebutted testimony that Foundation Program funding falls short of even meeting the costs of complying with Montana's minimum accreditation standards . . . forcing an excessive reliance on permissive and voted levies,"[12] the court concluded that the state failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed by the state constitution.[13]

The court cited evidence that per-pupil funding disparities between similar sized school districts ranged as high as eight to one, and that such disparities resulted in unequal educational opportunity in the form of narrower curriculum choices; ill-equipped laboratories; paucity of textbooks, instructional materials, and audiovisual equipment; and poor maintenance of facilities. The court agreed with the district court that equality of educational opportunity should not be measured by output; that "state fiscal difficulties in no way justify perpetuating inequities";[14] and that "spending disparities among Montana's school districts cannot be described as the result of local control."[15] Ruling that the existing method for dispensing state educational funds violated the equal educational opportunity clause of the state constitution, the court declined to rule on the related issue of education being a fundamental right.

In regard to three other issues, the court upheld the lower court's rulings that: (1) state accreditation standards were minimum standards, and "do not fully define either the constitutional rights of students or the constitutional responsibilities of the [s]tate of Montana for funding its public elementary and secondary schools";[16] (2) 874 funds (federal monies provided to districts serving children of federal employees) could not be included in the state funding formula until the United States Secretary of Education approved the state's equalization plan; and (3) school districts could not be awarded attorneys' fees under a "common fund" doctrine.[17]

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[11] Helena Elementary School Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989).

[12] *Id.* at 690.

[13] *Id.*

[14] *Id.*

[15] *Id.*

In Wisconsin, the state supreme court ruled that the current funding formula used to distribute state education monies was not inconsistent with a state constitutional provision that "the legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable";[18] and, therefore, was constitutional. The court reached this conclusion by examining the content of the constitutional convention debates during which the Wisconsin Constitution was framed. In doing so, the court concluded that "the requirement as to uniformity applies to the districts after they are formed, — to the character of the instruction given, — rather than to the means by which they are established and their boundaries fixed."[19]

The court then examined the funding formula for equal protection violations and determined that access to a free public education is a fundamental right under the Wisconsin Constitution. However, the court ascertained that no child was being denied access to an education; and, since local control over education—another Constitutional mandate—was partly responsible for the funding disparities, the court ruled that there existed no equal protection violations within the current financing scheme. Finally, in acknowledging the legitimacy of the plaintiff's claims of inadequate funds necessary for financing "specialized programs" to "meet the particularized needs of students related to the effects of poverty,"[20] the court decided that these demands may not be correctly described as claims for uniformity or equal treatment under the Wisconsin Constitution, but must rather be made to the legislature or to the community.[21]

The Texas Supreme Court reversed an appellate court ruling and affirmed, but modified, a trial court decision that the Texas school financing scheme was unconstitutional.[22] Disagreeing with the appellate court's decision that the term "efficient" was a "political" issue rather than a constitutional matter, the court determined that there existed an "express constitutional mandate" for the legislature to provide for an "efficient system of public free schools."[23] Citing "gross inequalities" existing within the current educational system, the court reasoned that the drafters of the state constitution would not consider the current financing scheme to be "efficient."[24]

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[16] *Id.* at 691.

[17] *Id.*

[18] Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

[19] *Id.* at 575.

[20] *Id.* at 585.

[21] *Id.*

[22] Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

Futhermore, in analyzing historical documents, the court reached the opinion that the constitutional phrase "a general diffusion of knowledge" prohibited the existence of an educational system which "provides not for a diffusion that is general, but for one that is limited and unbalanced."[25] This was evidenced by the wide disparities in property wealth among school districts, which, when coupled with the Texas educational financing scheme, resulted in great disparities in per-pupil expenditures across the state (i.e., $2,112 to $19,333), which, in turn, affected the quality of educational programs. Consequently, the court held "that the state's school financing system is neither financially efficient nor efficient in the sense of providing for a 'general diffusion of knowledge' statewide, and therefore . . . violates . . . the Texas Constitution. . . . There must be a direct and close correlation between a district's tax effort and the educational resources available to it; . . . districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort."[26]

In June 1989, the Supreme Court of Kentucky declared the state's system of common schools unconstitutional; the legislature had failed to comply with the constitutional mandate to "provide an efficient system of common schools throughout the state."[27] Similar to the Texas case, the Kentucky court had to determine the meaning of "efficient," and, to do so, also utilized historical records of constitutional debates to define the term.

Quoting the framers of the state constitution, the court found that a system of common schools was one "of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind."[28] It is a system where "there are no distinctions in the common schools, all stand upon one

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23. *Id.* at 393.
24. *Id.* at 395.
25. *Id.* at 396.
26. *Id.*
27. Rose v. Council for Better Educ., 88-SC-804-TG slip op. 1 (Ky. June 8, 1989).
28. *Id.* at 44.

level."[29] Finally, reiterating the words of one of the framers, and urging that they stand as "a guidepost for all Kentuckians today and in the future," the court recalled that "[i]f they are in the future to be the dependence of the people of Kentucky for the instruction of their youth, what is the logic of the situation? . . . *to seize every opportunity to make them more efficient*, to treat them with no niggard or stinted hand. . . ."[30]

When the court examined the current status of Kentucky's system of common schools, it found, "overall inadequacy of our system of education, when compared to national standards and to the standards of our adjacent states . . . great disparity . . . in educational opportunities throughout the state . . . [and] great disparity and inadequacy, of financial effort throughout the state."[31] Consequently, when juxtaposed with the constitutional mandates, the court found that the Kentucky system of common schools fell "short of the mark of the constitutional mandate of 'efficient.'"[32]

Eligibility requirements were in dispute in two New York cases. A New York appellate court ruled against a school district challenging a regulation governing eligibility for small school district supplemental aid.[33] The court rendered the case moot due to the passage of subsequent legislation, the qualifying requirements of which the district failed to meet.

In the second New York case, an appellate court held that eligibility requirements for teacher excellence awards violated equal protection in that "similarly situated educators" (i.e., department chairpersons) were ineligible for the funds because they were paid according to an administrator's salary scale rather than a teacher's.[34] The court ruled, however, that its ruling was not retroactive in effect.

In a final New York case, a school district challenged the implementation of a statute which reduced the district's state educational funding.[35] The court ruled that the state was not arbitrary or capricious in implementing the law which mandated that "identified" school districts make corrections regarding taxpayer membership in their school district. Such corrections increased the plaintiff school

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[29] *Id.* at 45.

[30] *Id.* at 44.

[31] *Id.* at 60.

[32] *Id.*

[33] Cerniglia v. Ambach, 536 N.Y.S.2d 227 (App. Div. 1988).

[34] Schneider v. Sobol, 546 N.Y.S.2d 221 (App. Div. 1988).

[35] Brentwood Union Free School Dist. v. State, 546 N.Y.S.2d 116 (App. Div. 1989).

district's gross income, which, in turn, decreased its amou
aid.

An Illinois appellate court reversed a lower court d
which school districts brought action seeking recomputati
educational funds.[36] State allocations had been based up
ously inflated property valuations which were lowered aft
ers appealed to the Tax Appeal Board. With the reduction
base, school district funds were decreased. At conflict was
tation of a statute governing recomputation of state aid f
fendants interpreted the statute as meaning that only e
computational nature (i.e., attendance figures or arithme
were covered by the statute. Plaintiffs maintained that fig
upon incorrect information (i.e., inflated property val
errors too, and as such were also covered. The court, agre
the school districts, reversed the trial court's decision and
the case for recomputation of state aid.

The Supreme Court of West Virginia issued a writ pro
lower court's order mandating that excess levies of weal
districts be redistributed to property poor districts.[37]
court's "recapture" order was premised upon alleged eq
tion violations and was activated with the failure of the p
statewide excess levy amendment.

Citing art. X, sec. 10 of the West Virginia Constitution, plaintiffs maintained that excess levies passed by voters of a county were permitted and encouraged by the constitution and should not be subject to equal protection principles. The court agreed for several reasons. First, in analyzing the two sections of the constitution, the court found that the more specific provision concerning excess levies superseded the more general and liberally construed provisions governing equal protection. Second, another constitutional principle mandated that more recent constitutional provisions should take precedence over older ones. In this case, the court observed that the provision on excess levies, passed in 1958, was far more recent than the equal protection provisions which dated back to 1872. Finally, the court sought to determine whether prohibition of the original order was the proper remedy. Observing that the lower court "exceeded its legitimate powers by the entry of an unconstitutional order,"[38] which penalized counties exercising their constitutional right concerning excess levies, the court held that a writ of prohibition should be issued.

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[36] Board of Educ. of Lockport Township High School Dist. 205 v. Gi
380 (Ill. App. Ct. 1988).

[37] State *ex rel.* Bds. of Educ. v. Chafin, 376 S.E.2d 113 (W. Va. 1988

[38] *Id.* at 120.

An Eighth Circuit Court of Appeals reversed in part and affirmed in part a lower court decision delineating the state of Missouri's role in funding interdistrict transfers for desegregation purposes.[88] While acknowledging that Missouri must "participate in funding desegregation in the St. Louis schools,"[89] the appellate court took issue with the extent of that role as defined by the district court. Citing an earlier decision which had set the parameters for the state's participation, the appellate court reversed the lower court's ruling that "Missouri was obligated to fund whatever interdistrict transfers were necessary for the districts to achieve their Plan Goal (25% black, 75% white) enrollment levels." Instead, the appellate court maintained that "a 15,000 student limit on Missouri's financial liability for interdistrict transfers was our original intent in outlining Missouri's obligations."[90]

Local Funds for Education

[illegible] two cases concerned the use of local [illegible] the Campbell County Board of Education adopted a resolution asking the Board of Commissioners to fund a new school. The site selected for the school did not comply with Tennessee regulations for school sites, and the State Commissioner of Education asserted that the school program and local financial circumstances were inadequate. The Board of Commissioners refused to fund the school.

In a prolonged series of actions including a second refusal by the Board of Commissioners to fund the school, a survey by the state, and ensuring elections of county commissioners, the Commissioners adopted a resolution approving funding at the proposed site.

An intervening election resulted in the replacement of the majority of the Board of Commissioners, and the new Board did not appropriate funds for the proposed school. A writ of mandamus was filed, and, one month later, a bond resolution failed. The Board of Commissioners filed for dismissal or summary judgment and the School Board opposed it.

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88. Liddell v. Board of Educ. of St. Louis, Mo., [illegible] F.2d [illegible] (8th Cir. 1989).

89. *Id.*

90. *Id.* at [illegible]

The court held that the Commissioners had an enforceable, legal duty to fund the proposed project, whereupon an appeal was filed. The Supreme Court of Tennessee reversed the decision, asserting that the duty of the Commissioners was discretionary rather than ministerial, a bond issue did not bind the Commissioners, and the proposed site did not conform to state rules and regulations.[43]

Modesto High School District in California assessed a construction company developer fees to support the construction of school facilities. The company sought a writ of mandamus to set aside prior impositions of school facility fees, refund those collected, and cease further assessments. The writ was entered, and on appeal the district argued that the mandate was not appropriate since the developers could enter suit for refund. The writ was reversed based on the court's interpretation of legislative intent.[44]

A Tennessee appellate court ruled in another case concerning local funds for education that a county was required to prorate interest funds earned from the sale of a city hospital, and give the school district its portion in accordance with a statute governing the [illegible] funds.[45] The court affirmed [illegible]

Federal Funds for Education

There were two federal appellate decisions and one state appellate decision concerning the use of federal education funds. The South Carolina Supreme Court ruled that counties must disburse federal funds made available by the state to school districts in which national forests were located.[46] Additionally, any accrued interest on the withheld funds must also be paid by the counties.

The United States Court of Appeals, Sixth Circuit, affirmed a decision by the United States Department of Education (USDOE) that the state of Michigan had misexpended federal funds provided for the state's vocational rehabilitation program.[47] By use of a random survey of cases, the Acting Rehabilitative Commissioner (ARC) of the USDOE's Rehabilitative Services Administration (RSA) determined that, in thirteen of the 259 cases, disallowable expenditures had been made.

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[43] State *ex rel.* Weaver v. Ayers, 756 S.W.2d 217 (Tenn. 1988).

[44] Sutco Constr. v. Modesto High School Dist., 256 Cal. Rptr. 671 (Ct. App. 1989).

[45] [illegible] Bd. of Educ. v. [illegible] County Comm'n, [illegible] S.W.2d [illegible] (Tenn. Ct. App. 1989).

[46] Charleston County School Dist. v. Charleston County, [illegible] (S.C. 1989).

[47] [illegible] (6th Cir. 1989).

The state of Michigan appealed the ruling on the grounds that the RSA did not have the proper authority to perform the audit. The court ruled in favor of the USDOE, upholding the delegation of authority by the Secretary of Education to the RSA. In interpreting several federal statutes delineating the delegation of duties by the Secretary,[48] the court determined that no unlawful delegation had occurred and, therefore, the results of the audit stood.

On a related matter regarding possible imposition of interest, the court agreed with the Education Appeals Board that, because the USDOE "retracted its efforts to collect the interest," . . . the issue was not ripe for decision by that court.[49]

A Ninth Circuit Court of Appeals reversed a decision of the United States Secretary of Education which would have required the state of California to return to the United States Department of Education approximately $700,000 in federal funds.[50] [illegible] the obligation of the funds. The Secretary [illegible] federal statute [illegible], the state must refund that amount. The state argued that the $700,000 had been obligated because it was carried over from one state fiscal year to the next, as allowed by federal statute, and then spent during that subsequent year. The state explained that the FIFO (first-in-first-out) accounting procedures used by California documented the obligation of the funds. The court agreed, stating that since more funds were expended during fiscal year 1981-82 than had been carried over from fiscal year 1980-81, the secretary's decision had no merit. The specific amount in question, $700,000, had been obligated according to the time frame of the federal statute.

School Fees

Washington Local School District in Ohio announced a $5 fee per pupil, per six-week grading period for paper products, copier materials, student record-keeping/test supply sheets, work sheets, and other consumable supplies. Parents challenged the legal authority

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48. 20 U.S.C. § 3472 (1979); 20 U.S.C. § 702(a) (1973); and 29 U.S.C. § 709(c) (1973).

49. Michigan Dept. of Educ. v. [illegible]

50. Department of Educ. of Cal. v. Bennett, [illegible] (9th Cir. 1988).

to impose fees or withhold grades and credits for failure to pay for supply items. The Supreme Court of Ohio held that the superintendent did not have authority to assess fees for the cost of administrative materials.[51]

SCHOOL TAX ISSUES

Issues pertaining to school taxes ranged from nonresident tuition charges to challenges of tax policies and procedures. The use of school tax referenda and several bond issues also were litigated during this period.

Tuition

A Nebraska taxpayer sought a declaratory judgment that a revenue statute pertaining to the nonresident high school tuition rates was unconstitutional. The taxpayer argued that it was an invalid delegation of legislative authority, an improper tax measure, and did not comply with other parts of the legislative bill.

A year later, the legislature repealed and replaced part of the bill, at which time the school district asserted that the taxpayer's question was moot. Summary judgment was granted the district, and the taxpayer appealed.

The Supreme Court of Nebraska reversed the decision and remanded the case with instructions to dismiss the taxpayer's petition. The court held that the taxpayer had not established the existence of a justiciable controversy, and thus did not have a *prima facie* case entitling him to declaratory relief.[52]

A Maryland appellate court considered the constitutional right of parents residing in one county to have their children attend the public schools of another county without paying tuition.[53] In vacating the lower court's decision which had ruled in favor of the school district's collection of tuition from the parents, the court remanded the case in order that the parents could initiate a review by the Maryland Board of Education as to the merit of their claim that, under the state constitution, their children were entitled to a free public education in any school district of the state.

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[51] Association for the Defense of the Wash. Local School Dist. v. Kiger, 537 N.E.2d 1292 (Ohio 1989).

[52] Mullendore v. Nuernberger, 434 N.W.2d 511 (Neb. 1989).

[53] Clinton v. Board of Educ., 556 A.2d 273 (Md. 1989).

Tax Assessment and Collection

Tax assessment and collection cases were litigated in six states during 1989. The California Building Industry Association challenged a special tax resolution for school facilities adopted by voters in a Los Angeles school district under a constitutional provision. The district imposed the special tax only on new units of residential development. The Association argued that extractions imposed on developers of new residential housing were development fees rather than special taxes.

On appeal, the court asserted that when a provision of the constitution is ambiguous, the separate provision pertaining to the issue must be harmonized; that implied partial appeal must be avoided; and that the intent of the electorate must be examined.[54] Because taxes are compulsory and development fees are imposed only if a developer elects to develop, the voter approved resolution was invalidated.

The California State Board of Equalization imposed a use tax on books sold to students through teachers by Scholastic Book Clubs. The corporation appealed, arguing that teachers were not acting under the corporation's authority since they were not obliged to take orders, sell, or deliver books. The court upheld the summary judgment for the Board.[55]

The Kentucky Supreme Court ruled on two cases. Logan Aluminum Company challenged the tax computations of the Russellville Independent Schools.[56] The court held that local public school districts are not state agencies and that challenges to the method of tax computation are properly litigated in local circuit courts, not the Kentucky Board of Tax Appeals. In a second case, the Kentucky Supreme Court ruled that agricultural and horticultural land owners were entitled to litigate the constitutionality of tax assessment methods when the value is not based on the purpose for which the land was used.[57]

In Texas, Lingleville Independent School District sought to collect delinquent real estate taxes on a natural gas pipeline belonging to Valero Transmission Company.[58] The pipeline was buried below normal plow depth and the school district argued that it was real property. On appeal, the pipeline was classified as personal property. The court based this decision on the facts that the rights and possibility of removing the pipeline were retained, there was no evidence of intention that it would ever become a part of the land, and it was used as an accessory to business, not as an accessory to the land.

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[54] California Bldg. Indus. Ass'n v. Governing Bd., 253 Cal. Rptr. 497 (Ct. App. 1988).

[55] Scholastic Book Clubs, Inc. v. State Bd. of Equalization, 255 Cal. Rptr. 77 (Ct. App. 1989).

[56] Board of Educ. v. Logan Aluminum, Inc., 764 S.W.2d 75 (Ky. 1989).

[57] Griggs v. Dolan, 759 S.W.2d 593 (Ky. 1988).

[58] Lingleville Indep. School Dist. v. Valero Transmission Co., 763 S.W.2d 616 (Tex. Ct. App. 1989).

Another case in Texas concerned an election which would allow voters to consolidate tax assessment and collection functions in all taxing units located within an appraisal district.[59] The Weatherford Independent School District and City of Weatherford sought to invalidate the election on several grounds. When a district court entered judgment for the school district and city, the county and state appealed. The Court of Appeals of Texas reversed the decision and held that the election was valid, but not binding on Weatherford Independent School District, where a majority of voters did not approve the measure.

Also in Texas, a bank sued for refund of *ad valorem* taxes on bank stock.[60] The Deer Park Independent School District was granted summary judgment on the grounds that a United States Supreme Court decision overruling Texas precedent and invalidating *ad valorem* property tax on bank shares could not be applied retroactively.

Several cases were litigated in Pennsylvania. The Pleasant Valley School District adopted a resolution to levy, assess, and collect an occupation and *per capita* tax to be collected by the elected tax collector. The tax collector refused to collect the tax, arguing that the directive was not an elected duty. The Commonwealth Court of Pennsylvania held that it was a statutory duty.[61]

Taxpayers in the Penn Hills School District challenged the legality of a new mercantile tax. The boundaries of the municipality of Penn Hills are coterminous with those of the school district, and the municipality already had a mercantile tax. Taxpayers sought injunctive relief from district collection of the tax, whereupon the district requested the municipality to share equally in the revenue if the taxpayers were granted relief. The court held that the case did not involve two political subdivisions. Thus, both the municipality and the school district could levy the same tax during the same year under the same taxing authority.[62]

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[59] Parker County v. Weatherford Indep. School Dist., 775 S.W.2d 881 (Tex. Ct. App. 1989).

[60] First Bank of Deer Park v. Deer Park Indep. School Dist., 770 S.W.2d 849 (Tex. Ct. App. 1989).

[61] Borger v. Pleasant Valley School Dist., 551 A.2d 648 (Pa. Commw. Ct. 1988).

The Weatherly School District obtained an order which held a rafting operator in a state park liable for the collection and remittance of an amusement tax. The order was reversed on the grounds that taxes cannot be imposed on activities in a facility of the Commonwealth.[63]

The Supreme Court of Connecticut held that wages paid to teachers for school-related extra duties and coaching assignments were subject to social security taxes. Town boards of education are not municipalities exempt from participation in the federal social security program.[64]

Palatine National Bank in Illinois sought relief from taxation based on a levy filed after the statutory due date. A refund was granted, and the county tax collector appealed. The court reversed the decision, observing that schools have the statutory authority to extend additional taxes for educational purposes at any time during a given fiscal year. Thus, the time period for certifying and returning a tax levy was not strictly applied.[65]

Use of School Tax Base Revenues

Two cases concerned the use of district revenues for payment of salaries. In West Virginia, the Logan County Board of Education resolved to provide a pay raise to all school personnel, pending the availability of anticipated new tax revenues. When the new revenues were not forthcoming, the State Board of School Finance ordered the board to adjust its budget downward. This effectively voided the proposed pay raises, whereupon the Logan County Education Association filed suit. The Supreme Court of West Virginia ruled that employees did not have a legitimate entitlement to the pay raise.[66]

A Florida appellate court ruled that an employee was entitled to terminal pay for accumulated sick leave upon retirement, after hav-

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62. Penn Hills School Dist. v. Municipality of Penn Hills, 555 A.2d 302 (Pa. Commw. Ct. 1989).

63. Whitewater Challengers, Inc. v. Weatherly School Dist., 563 A.2d 1305 (Pa. Commw. Ct. 1989).

64. Board of Educ. v. Connecticut State Employees Retirement Comm'n, 556 A.2d 572 (Conn. 1989).

65. *In re* County Collector of McHenry County, 536 N.E.2d 1288 (Ill. App. Ct. 1989).

66. Logan County Educ. Ass'n v. Logan County Bd. of Educ., 376 S.E.2d 340 (W. Va. 1988).

ing worked in the school district for six years.[67] The school district maintained that since the employee had failed to work a total of ten years in the district, she was ineligible for accumulated sick leave pay. The court, in ruling for the employee, pointed out that there was no minimum term of employment stated in the district's retirement policy, and that the employee had fulfilled the requirements of the Florida Division of Retirement; therefore, the employee was entitled to her accumulated sick leave pay.

A New Jersey Board of Education budget was rejected by voters, whereupon the municipality reduced the budget without a timely presentation of reasons for the reduction. The state board of education dismissed the municipality's answer to the budget reduction and restored the district budget.

On appeal, the state board's decision was reversed and further review sought. The Supreme Court of New Jersey affirmed the decision, holding that reasons must accompany a reduction in school board budgets following voter rejection and that the commissioner of education was obliged to consider the municipality's answer to budget reductions even if it is not submitted contemporaneously with the certification of budget reductions.[68] The court held that the later the municipality's answer, the stronger the presumption against the educational validity of the proposed budget cuts.

Also in New Jersey, a superior court held that the doctrine of necessity enabled members of a borough council who had conflicts of interest to participate in school budget decisions.[69] The necessity arose from the fact that their absence would preclude a council quorum.

Tax Exemptions

Cases pertaining to exemptions from sales, use, and *ad valorem* taxes were adjudicated during this reporting period. The Orleans Parish School Board sought exemption from a 1% additional sales tax on purchased or consumed items. An appellate court denied the exemption based on a legislative resolution which suspended all exemptions from the new 1% sales tax.[70]

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[67] Pitts v. Bay County School Bd., 540 So. 2d 157 (Fla. Dist. Ct. App. 1989).

[68] Board of Educ. v. Mayor of Deptford, 561 A.2d 589 (N.J. 1989).

[69] Allen v. Toms River Regional Bd. of Educ., 559 A.2d 883 (N.J. Super. Ct. Law Div. 1989).

[70] Orleans Parish School Bd. v. McNamara, 532 So. 2d 512 (La. Ct. App. 1988).

In Wyoming, the Sublette County School District sought to recover sales and use taxes paid by school construction contractors.[71] The Supreme Court of Wyoming denied the district claim that it was tax-exempt with respect to their funds. The court stated that, even though district funds were used by the contractors to pay the taxes, the contractors were nonexempt entities.

Ad valorem tax cases concerned faculty residences on private school property.[72] The superintendent of the Friends School in Baltimore appealed an assessment of real property taxes on his residence located on school property. The assessment was withdrawn, whereupon the Supervisor of Assessments appealed. On appeal, the court stated that the tax court erred in applying the standard that the residence had to be the site of academic activities in order to qualify for the exemption. Furthermore, the court stated that the decision required the exercise of judgment which first had to be made by an administrative agency. The case was reversed and remanded with instructions.

A North Dakota school superintendent protested personal income tax on the rental value of a residence provided by the school district.[73] On appeal, the rental value of the residence was excluded from the superintendent's gross income. The court held that the provision of such a "perk" was consistent with legislative intent to recognize the problems of small school districts and low administrative salaries.

In Florida, faculty residences at a not-for-profit, co-educational, church-related school were held exempt from *ad valorem* taxes.[74] A district court of appeal based the ruling on accreditation requirements that faculty live on campus and an educational rationale.

The County Board of Assessors in Nassau, New York denied landowners a school tax exemption on a business investment which was under construction. On appeal, landowners were granted the exemption prospectively. The refund claim was dismissed on the basis that the enabling statute did not apply retroactively.[75]

In ten New York cases where taxpayers sought to reinstate real property tax exemptions and compel refunds, the courts held that schools could not adopt resolutions to opt out of a statutory scheme for tax exemptions;[76] the county had relieved school districts of liability for tax refunds;[77] and the four-month limitation to compel a public body to perform a statutorily enjoined duty begins to run when the public body refuses to perform the duty in question.[78]

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[71] Sublette County School Dist. No. 1 v. State Bd. of Equalization, 770 P.2d 218 (Wyo. 1989).

[72] Friends School v. Supervisor of Assessments, 550 A.2d 657 (Md. 1988).

[73] Erdelt v. United States, 715 F. Supp. 278 (D.N.D. 1989).

[74] Saint Andrew's School v. Walker, 540 So. 2d 207 (Fla. Dist. Ct. App. 1989).

[75] Corporate Property Investors v. Uniondale Union Free School Dist. No. 2, 545 N.Y.S.2d 171 (App. Div. 1989).

Tax Deductions

Taxpayers in Mississippi donated leasehold interest in lands to a school district and reported charitable contributions on tax returns for two nonconsecutive years. Portions of the deductions were disallowed on the basis that the taxpayers had not established the actual value of their contributions. The taxpayers petitioned the tax court to redetermine the value of the leasehold interests and the court ruled instead on the validity of the leases. On appeal, the judgment was vacated and the case was remanded with instructions to focus on the valuation of the leaseholds.[79]

Tax Revenue Disbursement

Residents in four Illinois school districts sought to enjoin the County Treasurer from distributing portions of real estate taxes and to obtain a tax refund. They claimed that the new tax rate was improperly extended. A trial court denied relief on the basis that plaintiffs had an adequate remedy at law and that it was necessary to balance competing public interests. The decision was affirmed on appeal.[80]

Bond Issuance

Six cases pertaining to bond issuances were dismissed during this reporting period. In Pennsylvania, taxpayers challenged the issuance of general obligation bonds on the grounds that proper advertising requirements had not been followed and the open meetings law was violated. The case was dismissed.[81]

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[76] Coliseum Towers Assoc. v. Livingston Ass'n, 545 N.Y.S.2d 174 (App. Div. 1989); Coliseum Hotel Assoc. v. Uniondale Union Free School Dist. No. 2, 545 N.Y.S.2d 177 (App. Div. 1989).

[77] Bowery Sav. Bank v. Board of Assessors, 545 N.Y.S.2d 178 (App. Div. 1989); Jericho Quadrangle One v. Musiello, 545 N.Y.S.2d 181 (App. Div. 1989); Garden City Center Assoc. v. Board of Assessors, 545 N.Y.S.2d 184 (App. Div. 1989); Global Frozen Food v. County of Nassau, 545 N.Y.S.2d 187 (App. Div. 1989); Reckson Assoc. v. Uniondale Union Free School Dist. No. 2, 545 N.Y.S.2d 189 (App. Div. 1989).

[78] Coliseum Towers, 545 N.Y.S.2d 173 (App. Div. 1989); Jericho Quadrangle, 545 N.Y.S.2d 181 (App. Div. 1989); Jericho Properties No. 1 v. Musiello, 545 N.Y.S.2d 183 (App. Div. 1989); Garden City Center Assoc. v. Board of Assessors, 545 N.Y.S.2d 184 (App. Div. 1989); Global Frozen Food v. County of Nassau, 545 N.Y.S.2d 187 (App. Div. 1989); Jericho-Westbury Indoor Tennis v. Board of Assessors, 545 N.Y.S.2d 193 (App. Div. 1989).

[79] Stewart v. Commissioner of Internal Revenue, 841 F.2d 118 (5th Cir. 1988).

[80] Alexander v. County of Tazwell, 537 N.E.2d 1149 (Ill. App. Ct. 1989).

Also in Pennsylvania, a challenge of a school district issuance of general obligation bonds was dismissed.[82] When a group of citizens appealed, the court held that the district had authority to take the steps necessary to finance construction before the actual project was underway or completely and exhaustively planned. A twenty-eight page document sufficiently identified the project and an evidentiary hearing was not required to establish the legality of adopted debt service schedules.

In Georgia, an approved bond issue was contested on the grounds that it violated a Voting Rights enactment. Plaintiff charged that combining school improvement proposals into one question prevented individuals in the black community from casting effective votes. The district court held that combining proposals for improvement as one proposition was allowed by statute and that there was no violation of Voting Rights enactments.[83]

A bond and an *ad valorem* tax proposition were opposed by Louisiana citizens who argued that the proposed construction was based on sinister motives and malicious racist intentions to economically exploit black people. The suit was dismissed with prejudice.[84]

A tax increment passed to fund a water supply system in the Walled Lake Consolidated School District was at issue in Michigan. The district claimed that the tax increment financing plan deprived them of tax revenues needed for schools. The case was dismissed with prejudice.[85]

Interest rates for bonds were litigated in Illinois when taxpayers filed suit against the Allendale Board of Education.[86] The case was dismissed and later reversed and remanded with instructions that the rate had to conform to the specific interest rate ceiling set forth in enabling legislation.

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[81] Property Owners v. Commonwealth, 552 A.2d 769 (Pa. Commw. Ct. 1989).

[82] Bethel Park Citizens for Better Educ. Less Taxes v. Commonwealth, 563 A.2d 969 (Pa. Commw. Ct. 1989).

[83] Lucas v. Townsend, 714 F. Supp. 525 (M.D. Ga. 1989).

[84] Frank v. St. Landry Parish School Bd., 540 So. 2d 1200 (La. Ct. App. 1989).

[85] Walled Lake Consol. School Dist. v. Charter Township of Commerce, 437 N.W.2d 16 (Mich. Ct. App. 1989).

[86] Bates v. Board of Educ., 538 N.E.2d 1299 (Ill. App. Ct. 1989).

Delinquent School Taxes

School districts in Louisiana, Texas, and Pennsylvania were litigants in delinquent tax cases during this reporting period. St. Landry Parish School Board attempted to collect delinquent sales, use, and occupational license taxes from the new owner of a retail tire store in Louisiana. The school district had been awarded judgment for delinquent taxes before it was sold. The new owners of the store had a Hold Harmless Agreement from the prior owners of the business. A court of appeals affirmed that the corporate taxpayer was not liable as successor to the previous operators of the retail store for delinquent taxes.[87]

In Texas, Huffman Independent School District sought delinquent *ad valorem* taxes on foreclosed property held by the First National Bank of Bellaire.[88] The defendant argued that collection required that notice of the appraised value of the land must be given to the property owner and the bank had not received such notice. The school district was granted summary judgment and a court of appeals affirmed that the bank was not the property owner.

A second case in Texas denied a refund of penalties, interest, and collection fees to a taxpayer who claimed that his taxes were delinquent because the district mailed the tax notice to an incorrect address.[89] A third case concerned a taxpayer appeal of the valuation of property.[90] The court held that the property valuation had not been resolved administratively, reversed the judgment for the school district, and remanded the case.

A complicated case originating with the Freer Independent School District bringing suit to collect delinquent taxes in 1987 was continued during this term.[91] In earlier litigation, the case was remanded to trial court with instructions to collect evidence which would enable the court to legally describe each parcel of property upon which the plaintiff, Manges, owed taxes.

Following the itemization of delinquent taxes, taxpayers appealed again, and the court of appeals affirmed the decision and rendered judgment on the parcels of land about which descriptions were not an issue. When taxing officials sought to foreclose, the taxpayer sought and was granted an interlocutory injunction. On appeal, the judgment was final and the injunction was vacated.[92]

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[87] St. Landry Parish School Bd. v. Acadiana Tire Shop, Inc., 535 So. 2d 1283 (La. Ct. App. 1988).

[88] First Nat'l Bank of Bellaire v. Huffman Indep. School Dist., 770 S.W.2d 571 (Tex. Ct. App. 1989).

[89] Sheldon v. Jasper Indep. School Dist., 768 S.W.2d 884 (Tex. Ct. App. 1989).

[90] Valero Transmission Co. v San Marcos Consol. Indep. School Dist., 770 S.W.2d 648 (Tex. Ct. App. 1989).

[91] Manges v. Freer Indep. School Dist., 728 S.W.2d 842 (Tex. Ct. App. 1987).

In 1987, a commonwealth court in Pennsylvania had remanded a case for an accounting of tax monies owed Moon Area School District for delinquent parking taxes.[93] On appeal, the Supreme Court of Pennsylvania reversed and remanded the case, asserting that the school district had no authority to impose a duty on the county to collect a parking tax and that the managing operator was a servant of the county, not an independent contractor.[94]

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[92] Freer Indep. School Dist. v. Manges, 775 S.W.2d 774 (Tex Ct. App. 1989).

[93] Moon Area School Dist. v. Garzony, 529 A.2d 540 (Pa. Commw. Ct. 1987).

[94] Moon Area School Dist. v. Garzony, 560 A.2d 1361 (Pa. 1989).

8

HIGHER EDUCATION

Robert M. Hendrickson

with Dorothy E. Finnegan

Introduction / 195
Intergovernmental Relations / 195
Discrimination in Employment / 202
    Title VI / 203
    Title VII / 204
    The Equal Pay Act / 207
    Title IX / 207
    Age Discrimination in Employment / 208
    Rehabilitation Act / 208
    Hiring Discrimination / 209
Faculty Employment / 209
    Nontenured Faculty / 209
        First Amendment Freedom of Speech / 209
        Nonrenewal or Denial of Tenure / 210
        Part-time Faculty / 214
    Tenured Faculty / 214
        Termination for Cause / 214
        Termination for Financial Exigency / 215
        Denial of Faculty Privileges / 216
Administrator and Staff Termination / 216
All Employees / 219
    Sexual Harassment / 219
    Denial of Employee Benefits / 219
    Collective Bargaining / 221
Students / 223
    Admissions / 223
    Nonresident Tuition / 223
    Financial Aid / 224
    First Amendment / 230
        Freedom of Speech / 230
    Dismissal / 232
        Disciplinary Dismissal / 232
        Academic Dismissal / 233
    Other Constitutional Issues / 236

Personal Injury / 237
Workers' Compensation / 239
Contract / 240
Deceptive Practices / 242
Negligence / 243
Medical Malpractice / 244
Antitrust / 245
Patents / 245
Estates and Wills / 246

INTRODUCTION

In 1989, distinct themes ran through the litigation. These themes reflect the difficulty in reducing the federal deficit, increased service demands on state budgets, and an economic condition of marginal growth. One of the more interesting themes is the balance of authority among various agencies, political entities, and boards of trustees of higher education institutions. The definitions of authority impact students, faculty, administrators, alumni, and donors of postsecondary institutions. While the interpretation of constitutional rights in relationships between the institution and students, employees, and communities continue to be heavily litigated, other challenges involve the authority to determine educational policy and management prerogatives. Cases dealing with contracts, copyright, patents, and antitrust prohibitions point to the growing business-university relationships.

INTERGOVERNMENTAL RELATIONS

This section presents issues concerning the application of tax laws, zoning statutes, sunshine laws, environmental laws, governmental ethics, and jurisdictional statutes to systems and institutions of higher education. Cases in this area serve to define the balance of authority between city government, state and federal agencies, and institutional boards of trustees in their interactions with educational policy and management. The section also discusses questions of sovereign immunity.

The legality of tax provisions were again before the courts. In Oklahoma, a city experiencing economic decline, formed an economic development corporation and implemented a voter approved cated in the city.[1] The state Supreme Court ruled that the tax was designed to promote the public good and, therefore, the use of public money for a private purpose was not within the meaning of the statute. Citing *Hunt v. McNair*,[2] the court found that the funding scheme which involved buying the campus and leasing it back to the private school did not violate the separation of church and state provisions of the state constitution or the first amendment "free exercise" or "establishment" clauses of the United States Constitution.

In Iowa, the court upheld the assessment by the city of a franchise fee on cable television service offered to students at a public university located within the city but owned by the state.[3] The court reasoned that the city could charge the fee since the cable company ran its cable through city easements to serve the university.

City authority was also challenged in a case involving a proprietary institution.[4] The school sought to enjoin the city from distributing money under the Job Training Partnership Act and to gain city approval for its application for job training funds. The court ruled that the decision of the Commission of the City of New York to exclude proprietary schools from the fund dispersion program was a misinterpretation of the legislative intent under the act and an arbitrary decision on the Commission's part. On remand the court ordered the city to reconsider the school's application.

The authority of the board of trustees of higher education institutions was before the courts in several cases. In California, an organization of small family farms charged that the University of California was in violation of the Hatch Act of 1887[5] because its programs and research waged financial hardship on the small farmer and were designed to promote farming as a big business.[6] The court reversed a lower court decision, and found no reference to the small family farm in the legislation. Citing from the legislation the court noted that the Hatch Act sought "to promote the efficient production, marketing, distribution, and utilization of farm products."[7]

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[1] Burkhardt v. City of Enid, 771 P.2d 608 (Okla. 1989).

[2] Hunt v. McNair, 413 U.S. 734 (1973).

[3] City of Ames, Iowa v. Heritage Communications, Inc., 861 F.2d 185 (8th Cir. 1988).

[4] SCS Business & Technical Inst., Inc. v. Barrios-Paoli, 542 N.Y.S.2d 965 (Sup. Ct. 1989).

[5] 7 U.S.C. § 361a *et seq.*

[6] California Agrarian Action Project, Inc. v. Regents of Univ. of Cal., 258 Cal. Rptr. 769 (Ct. App. 1989).

[7] *Id.* at 771.

A hunting and fishing club challenged [illegible] Board of Trustees of the University of Michigan to prohibit fishing on a stretch of a river which runs through University property.[8] The court found that the Board had the power to regulate its property for educational purposes including the banks of a navigable river running through the campus. The court refused to judge the appropriateness of the reasons for the ordinance since they are nonjusticiable legislative matters.

In Nebraska, taxpayers were unsuccessful in an attempt to prevent the board from closing the branch campus of a community college.[9] Another community college board's contract with a private book company to establish a bookstore on campus was challenged by an off-campus bookstore.[10] At issue was whether the statute allowing the board to contract with a book company authorized not only the sale of educational materials and texts but also general trade books. The court ruled that the sale of general trade books was outside the provisions of the statute.

Questions concerning the authority of agencies over the educational activities of postsecondary institutions were also litigated. In Massachusetts, a dental hygienists school sued the Board of Registration in Dentistry over the procedures followed in the Board's denial of the school's application for a license to teach the administration of certain local anesthesia techniques.[11] The court found that the decision of the professional board was based on sound information and the presentation of that information did not require the board to observe the rudiments of an adjudicatory proceeding.

A university security guard claimed he was qualified for state police officers' retirement benefits because the local retirement board said he was involved in hazardous duty. The court found that the statutory language excluded security guards.[12] In New Jersey, the court overturned an Executive Commission on Ethical Standards ruling prohibiting a Rutgers law professor, while conducting a clinical teaching experience for law school students, from representing a client who sued another state agency.[13] The court found that the effect of the statute would make it impossible for a public law school to provide clinical experiences for law students. This effect, the court reasoned, was outside of the intent of the legislature in passing the statute.

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[8] Michigan United Conservation Clubs v. Board of Trustees, 431 N.W.2d 217 (Mich. Ct. App. 1988).

[9] Koenig v. Southeast Community College, 438 N.W.2d 791 (Neb. 1989).

[10] 1st Street Books v. Marin Community College Dist., 256 Cal. Rptr. 833 (Ct. App. 1989).

[11] Forsyth School v. Board of Registration, 534 N.E.2d 773 (Mass. 1989).

[12] Arizona Bd. of Regents v. State, 771 P.2d 880 (Ariz. Ct. App. 1989).

Sunshine laws were again in the courts. A federal agency, the National Security Archives (N.S.A.), was successful in achieving a classification which gave it access to public records at a discounted rate.[14] Federal law provides that access to public records be provided at the expense of those seeking the records, except for educational institutions and the media which shall be given the records at a discount. The court ruled that the N.S.A. was not an educational institution but fit the definition of news media.

Several cases involved access to the files and search committee deliberations in a presidential search. In Minnesota, the court ruled that a search committee formed by the faculty governance committee was not a committee of the regents subject to the open meeting provisions.[15] The court reasoned that while the regents approved the committee, no regents were members of the committee formed by another body. In Georgia, however, the applications, resumes, and vitae of presidential applicants would be opened to public view, but under the law, letters of recommendations were confidential evaluations exempt from view.[16]

A Maine university attempted to shield from public view the termination agreement executed between the institution and the women's basketball coach.[17] The court ruled that under the sunshine laws only the sentence regarding confidential medical information would be shielded from the public.

Several animal rights groups sought access to information. Through court action,[18] a New York group gained access to inspection reports generated by the "Laboratory Animal Users Committee" in compliance with the federal statute.[19] However, the court cautioned that the open meeting laws were not intended to be used as a soap box to promulgate certain views.[20] In Washington, an animal rights group sought and the court granted access to information similar to what the university had offered in prelitigation negotiations.[21] At issue on remand was whether the animal rights group actually prevailed at trial so as to be granted by the court an award of attorney fees. In another case where attorney fees were at issue and where the case was ruled moot because the requested information had been released,[22] the court ruled that the newspaper should be awarded attorney fees as the prevailing party.[23]

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[13] *In re* Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542 (N.J. 1989); *see* The Yearbook of School Law 1989, at 201, *In re* Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 537 A.2d 713 (N.J. Super. Ct. App. Div. 1988).

[14] National Security Archive v. United States Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989).

[15] The Minnesota Daily v. University of Minn., 432 N.W.2d 189 (Minn. Ct. App. 1988).

[16] Board of Regents v. The Atlanta Journal, 378 S.E.2d 305 (Ga. 1989).

[17] Guy Gannett Publishing Co. v. University of Me., 555 A.2d 470 (Me. 1989).

[18] ASPCA v. Board of Trustees, 541 N.Y.S.2d 183 (Sup. Ct. 1989).

Sunshine or disclosure laws were at issue in a Georgia case, which was dismissed as moot. Also questioned was the authority of the attorney general to seek disclosure under the law without the authorization of the governor.[24] Cornell University was granted access to nonredacted information of a city police investigation of an alleged rape by one of the University's security guards.[25]

Finally, in a sunshine-related case, questions of academic freedom and access to research information were before the court. The American Tobacco Company requested access to research data on the hazards of smoking for its defense in a pending lawsuit.[26] The court ruled that the court monitored access would not violate any scholar's privilege and that the order protected the patient-physician privilege and research subject's confidentiality.

Zoning laws were at issue in a Florida case.[27] The relationship between a small town and a new private college for the disabled deteriorated when the college began to buy residential property throughout the community to use for college activities. The town refused to grant a zoning variance for one property and rewrote its zoning ordinance to exclude the college from primarily residential areas. The court upheld the new ordinance and the zoning commission's definition of schools that excluded colleges. Furthermore, they ruled that the zoning ordinance did not violate the equal protection or due process clauses of the Constitution.

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[19] 7 U.S.C. §§ 2132(e), 2143(b).

[20] ASPCA v. Board of Trustees of State Univ. of N.Y., 541 N.Y.S.2d 183, 185 (Sup. Ct. 1989).

[21] Progressive Animal Welfare Soc'y v. University of Wash., 773 P.2d 114 (Wash. Ct. App. 1989).

[22] *See* The Yearbook of School Law 1988 at 227, North Carolina Press Ass'n, Inc. v. Spangler, 360 S.E.2d 138 (N.C. Ct. App. 1987).

[23] North Carolina Press Ass'n, Inc. v. Spangler, 381 S.E.2d 187 (N.C. Ct. App. 1989).

[24] Bowers v. Board of Regents, 378 S.E.2d 460 (Ga. 1989).

[25] Cornell Univ. v. City of N.Y. Police Dep't, 544 N.Y.S.2d 356 (App. Div. 1989).

[26] Mount Sinai School of Medicine v. American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989).

[27] DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479 (M.D. Fla. 1989).

213

Zoning based on use and tax exempt status was also litigated. In another case, a Florida community college foundation purchased a building, part of which would be used as classroom space and part of which would be leased to a bank.[28] The court ruled that the building did not qualify for tax exemption that year because, during remodeling, it was not actually used for educational purposes. In Illinois a university tennis facility leased to a private club but used by the university for a limited number of hours was not exempt from real estate tax as a school property.[29] A Muslim student group, after prevailing on a challenge to a zoning ordinance, was awarded attorney fees but not at the usual rate. On appeal the case was reversed and remanded for the lower court to establish reasons for the award at the lower than normal rate.[30]

Several cases involved compliance with environmental impact issues. For example, a University of California case[31] was heard on appeal. The California Supreme Court found that the environmental impact statement was deficient only to the extent that it failed to discuss future research project use in the facility.[32] The court found the environmental impact statement regarding current uses to be adequate and would not stay present activities at the building pending prescribed revisions of the environmental impact statement. The University of California was also in court over plans to build a residence hall near an inactive portion of the Hayward Fault. The court ruled that the conclusion by two independent experts that the portion of the fault was inactive was valid and acceptable under the state statutes governing construction near active fault lines.[33]

A number of cases involve jurisdictional questions. In one case, a federal appellate court affirmed the lower court dismissal of all charges against a university.[34] While university police arrested the plaintiff, the constitutional charges of illegal detention involved the county facility he was transferred to immediately upon his arrest, not the university arresting officer.

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[28] 28. Metropolitan Dade County v. Miami-Dade County Community College Found., 545 So. 2d 324 (Fla. Dist. Ct. App. 1989).

[29] 29. DePaul Univ., Inc. v. Rosewell, 531 N.E.2d 884 (Ill. App. Ct. 1988).

[30] 30. Islamic Center of Miss., Inc. v. City of Starkville, Miss., 876 F.2d 465 (5th Cir. 1989).

[31] 31. *See* The Yearbook of School Law 1988 at 228, Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of San Francisco, 238 Cal. Rptr. 451 (Ct. App. 1987).

[32] 32. Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988).

[33] 33. Better Alternatives for Neighborhoods v. Heyman, 260 Cal. Rptr. 758 (Ct. App. 1989).

Another case involving an arrest and alleged assault by campus police landed in the Supreme Court. The Court ruled that the statute of limitations to file a suit under section 1983 was the limitation period enumerated in the state personal injury statutes of three years rather than the more limiting one year provisions of intentional torts statutes.[35] In Pennsylvania, a court ruled that campus police had jurisdiction to make an arrest on commercial property adjacent to and owned by the university.[36]

A husband was unsuccessful in a claim of a violation of the Code of Government Ethics emanating from the affair the president of a college had with his administrative assistant, the husband's wife.[37] Furthermore, the court found no cause of action under a charge of alienation of his wife's affection.

Sovereign immunity was at issue in several cases. A Kansas university medical center possessed eleventh amendment immunity from a suit against it or its individual officers in their official capacity.[38] Suits against individual officers in their individual capacities are still pending. An Ohio case also established eleventh amendment immunity.[39]

A university requested declaratory judgment over an ownership issue; land deeded to the state for a state park reverted back to an estate held by the university when the state ceased that use of the land.[40] The court ruled that this was a "quiet title action" requiring that it be solved in the local jurisdiction where the land was located.

Cases involving university hospitals were again numerous. A federal court ruled that a hospital could expect reimbursement in the form of stipends and overhead costs of residents' work in an outpatient clinic as part of their residency training program.[41] In Iowa, the federal circuit court affirmed a lower court opinion[42] which allowed the calculation of patient fees paid under the state indigent care program in arriving at the amount necessary to discontinue the Hill-Burton Act free indigent care.[43] Similarly, a state department could calculate the payment of medical cost based on costs determined from an efficiently and economically operated hospital standard.[44]

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[34] Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989).

[35] Owens v. Okure, 109 S. Ct. 573 (1989).

[36] Commonwealth v. Mitchell, 554 A.2d 542 (Pa. Super. Ct. 1989).

[37] Farrell v. Boyer, 541 So. 2d 398 (La. Ct. App. 1989).

[38] Gray v. University of Kan. Medical Center, College of Health Sciences, School of Nursing, 715 F. Supp. 1041 (D. Kan. 1989).

[39] Dillion v. University Hosp., 715 F. Supp. 1384 (S.D. Ohio 1989).

[40] State Dep't of Natural Resources v. Antioch Univ., 533 So. 2d 869 (Fla. Dist. Ct. App. 1988).

[41] University of Cincinnati v. Bowen, 875 F.2d 1207 (6th Cir. 1989).

Several hospital cases involved the collection of fees for patient services. In one case, the court ruled that the insured could sign over obligations for patient service holding the insured's Health Maintenance Organization responsible for payment.[45] In another case, an insurance company was obligated to assess and pay the hospital for its services prior to finalizing a settlement with the hospital's patient in a personal injury claim.[46]

A case involving a challenge to a Health Facilities Planning Board grant of a certificate of need to a university to establish a hospital was back on appeal.[47] The court ruled that administrative remedies need not have been finished before this action was commenced.

DISCRIMINATION IN EMPLOYMENT

Litigation resulting from discrimination covered issues involved in the enforcement of various federal statutes. Title VI cases dealt both with questions surrounding court ordered integration of state systems of higher education and with proper federal agency enforcement of the law. Cases claiming title VII and Equal Pay Act violations were common and involved hiring, pay, award of benefits, and retaliation disputes. Litigation under title IX continued to be sparse while the Rehabilitation Act and Age Discrimination Act litigation continued at a moderate pace.

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[42] *See* The Yearbook of School Law 1989 at 200, Lile v. University of Iowa Hosps. and Clinics, 674 F. Supp. 288 (S.D. Iowa 1987).

[43] Lile v. University of Iowa Hosps. and Clinics, 886 F.2d 157 (8th Cir. 1989).

[44] Hahnemann Univ. v. Commonwealth Dep't of Pub. Welfare, 564 A.2d 521 (Pa. Commw. Ct. 1989); *See also* Presbyterian-Univ. of Pa. Medical Center v. Commonwealth, 553 A.2d 1027 (Pa. Commw. Ct. 1989).

[45] Loyola Univ. Medical Center v. Med Care HMO, 535 N.E.2d 1125 (Ill. App. Ct. 1989).

[46] State *ex rel.* Univ. of Iowa Hosps. and Clinics v. Hunter, 442 N.W.2d 94 (Iowa 1989).

[47] Condell Hosp. v. Illinois Health Facilities Planning Bd., 530 N.E.2d 217 (Ill. 1988); *see* The Yearbook of School Law 1989 at 204, Condell Hosp. v. Health Facilities Planning Bd., 515 N.E.2d 750 (Ill. App. Ct. 1987).

Title VI

A number of title VI cases were litigated this year. The lead off case resulted from a previously reported court ruling that the state of Louisiana was operating a discriminatory dual system of higher education in violation of title VI.[48] The district court in the early summer, issued the specific court order to bring the state system of higher education into compliance with the law.[49] The extensive court order reduced the number of boards to one state board of higher education; stipulated the composition and selection of the board; merged the black law school with the previously all white law school; and ordered the development of a classification scheme for tiering the state institutions based on mission.

In a subsequent ruling noting pending appeal to the Supreme Court, the court refined the order to require the immediate desegregation of staff and students through the establishment of incentive programs to recruit the nonpredominant race at the racially predominant institutions.[50] The court also refused to stay its previous order. Later in the summer, the court-ordered remedies to eliminate discrimination in Louisiana were back in the court.[51] In this decision, the court rejected both Southern and Grambling Universities' challenges to the consolidation of their programs. The Universities alleged that the court-ordered actions should be reserved to the state for resolution.

In another important landmark case, a federal circuit court of appeals ruled that the intervenors in the *Adams* case[52] did have standing to litigate since they were the victims of the discrimination.[53] However, the question of whether the court exceeded its authority in seventeen years of court orders by assuming a federal agency's constitutional prerogatives will be decided in the next term.

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[48] *See* The Yearbook of School Law 1989 at 204; United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988).

[49] United States v. Louisiana, 718 F. Supp. 499 (E.D. La. 1989).

[50] United States v. Louisiana, 718 F. Supp. 521 (E.D. La. 1989).

[51] United States v. Louisiana, 718 F. Supp. 525 (E.D. La. 1989).

[52] Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972) *modified*, Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), *aff'd and modified*, 480 F.2d 1159 (D.C. Cir. 1973) (the modifications allowed the states time to submit plans for compliance rather than ordering immediate compliance). *See* Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983) (affirms the D.C. District Court authority to issue a court order monitoring agency sought compliance by North Carolina with title VI). *See also* Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (provided for the geographic expansion to all 50 states and the consolidation of court orders from Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976); and Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987), *remanded from*, Womens Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984).

[53] Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989).

In Tennessee, the court awarded attorney fees to a private party when the state and the private party prevailed in a suit against the United States.[54] The United States failed in a challenge of that portion of the consent decree which set racial quotas for the admission of blacks to preprofessional programs as discriminatory to nonminority citizens.[55] The court reasoned that change of position and loss by the United States allowed the court to award costs to the prevailing parties.

In Georgia, private individuals were denied relief from a consent decree that enforced the integration of a predominantly black public institution of higher education.[56] Relief was sought because the parties complained that they were not informed of the impending resignation of the college president at the time the consent decree was negotiated. The court reasoned that the identity of the president of the institution was not pertinent to the content of the consent decree.

Title VII

Cases involving discrimination under title VII continued to be litigated although the volume has declined slightly. This section commences with cases dealing with the question of tolling. In California, a black teacher who failed to bring action in court within the ninety-day limit of the issuance by EEOC of a "Right to Sue" notice was time-barred from prosecuting the case.[57] In another California case, the court found it lacked jurisdiction because the alleged discrimination occurred more than 300 days prior to the filing of charges with EEOC.[58] The statute of limitations continues to be the deciding factor in a number of title VII cases.

In a case on appeal, a federal circuit court vacated and remanded a decision.[59] EEOC had issued right to sue notices on two of the plaintiff's three charges: discrimination in pay and promotion based on her gender, and retaliation against her husband, a faculty member at the institution (a claim now joined by her husband). The court on appeal found that the lower court erred in finding that the plaintiff had not exhausted administrative remedies because a right to sue notice had not been issued on a third claim before EEOC. The court also found that the husband could "piggy-back" on the claim of the plaintiff since he was similarly situated. The husband charged retaliation in his removal as department head after his wife failed in her first EEOC claim.

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[54] Geier v. Richardson, 871 F.2d 1310 (6th Cir. 1989).

[55] *See* The Yearbook of School Law 1987 at 238, Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986); *see also* Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

[56] Hunnicutt v. Board of Regents of Univ. Sys. of Ga., 122 F.R.D. 605 (M.D. Ga. 1988).

[57] Mitchell v. Los Angeles Community College Dist., 861 F.2d 198 (9th Cir. 1988).

[58] Sosa v. Hiraoka, 714 F. Supp. 1100 (E.D. Cal. 1988).

[59] Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989).

Several cases involved the establishment of a *prima facie* case of discrimination under the disparate treatment theory. In Alabama, the court reversed a lower court decision finding that the discontinuation of an assistant to the president position gave rise to no inference of sex discrimination since the plaintiff could not show that she was treated differently than other applicants.[60] In New York a federal district court issued a summary judgment finding that the plaintiff was unable to establish a *prima facie* case of discrimination in her removal from an administrative position.[61]

Several cases previously litigated were before the courts on questions of the use of multiple regression in the establishment of a *prima facie* case. In Wisconsin, the federal circuit court affirmed a lower court opinion.[62] The court found that the lower court was correct in ruling that statistical evidence that showed significant difference in the salaries of Catholic and non-Catholic faculty was not dispositive if the number of scholarly publications, the basis of salary determinations, showed Catholics at the institution to be more productive than non-Catholics.[63] The circuit court noted that it was appropriate when the district court judge pointed out flaws in the design of the sample (i.e., the failure to control for rank).

In a New York case on appeal, the court, in affirming a lower court opinion,[64] refused to adopt the plaintiff's standard that two standard deviations from the mean in statistical evidence established a *prima facie* case of discrimination under a disparate treatment claim.[65] The court also ruled that neither allegations of pre-1972 discrimination without supporting evidence nor the statistical study's assumption that rank was a discriminatory factor were sufficient to require exclusion from the regression analysis.

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[60] Moore v. Alabama State Univ., 864 F.2d 103 (11th Cir. 1989).

[61] Ritzie v. City Univ. of N.Y., 703 F. Supp. 271 (S.D.N.Y. 1989).

[62] *See* The Yearbook of School Law 1989 at 206, Tagatz v. Marquette Univ., 681 F. Supp. 1344 (E.D. Wis. 1988).

[63] Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988).

[64] *See* The Yearbook of School Law 1989 at 208, Ottaviani v. State Univ. of N.Y. at New Paltz, 679 F. Supp. 288 (S.D.N.Y. 1988).

[65] Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365 (2d Cir. 1989).

Two cases where the institutions' reasons were found to be a pretext for discrimination were affirmed without a decision. An Alabama decision[66] affirmed that the reasons for the employment decision were a pretext for discrimination on national origin.[67] A circuit court also affirmed[68] that a Delaware institution's denial of tenure was a pretext for discrimination based on national origin.[69]

The termination of a consent decree was requested of the court. Brown University had entered into a consent decree in 1977 setting goals for the adequate representation of women on the university's tenured faculty. The women in this case requested that the decree be modified to set a goal for women faculty representation within the ranks of the tenured faculty based on urgent market availability figures. The University claimed that the decree should be terminated since the University had met the provisions of the decree for 1987 based on the adjusted figures that allow for the attrition of nontenured tenure track female faculty. The court did not lift the decree but lifted the hiring requirements for nontenured faculty.[70] However, the goals for tenured female faculty remained along with the University's burden of proof of nondiscrimination which under the decree is more onerous than the burden under title VII. However, through an appeal for a rehearing, another court found that the decree should be lifted since the University had come to within 90% of compliance with the goals without adjusting for the attrition of nontenured female faculty.[71]

In a case adjudicated earlier[72] in favor of the faculty member's retaliation claim, the court modified the lower court decision. The court affirmed the lower court finding that the institution had discriminated against the plaintiff in hiring based on her gender but the court had exceeded its judicial discretion in the award of the rank of full professor with tenure.[73] On appeal, the court reasoned that since tenure was not automatic there was no reason to believe the board would have granted tenure and such matters should be left to the judgement of academic professionals.[74] In comparing the faculty member to other similarly situated male faculty, the court found an obvious difference in treatment and the application of standards which were clearly based on the factor of the plaintiff's gender.

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[66] *See* The Yearbook of School Law 1988 at 232, Harrell v. University of Montevallo, 673 F. Supp. 430 (N.D. Ala. 1987).

[67] Harrell v. University of Montevallo, 861 F.2d 725 (11th Cir. 1988).

[68] Ohemeng v. Delaware State College, 862 F.2d 309 (3d Cir. 1988).

[69] *See* The Yearbook of School Law 1989 at 215, Ohemeng v. Delaware State College, 676 F. Supp. 65 (D. Del. 1988).

[70] Lamphere v. Brown Univ. in Providence, R.I. and Providence Plantations, 706 F. Supp. 131 (D.R.I. 1989).

[71] Lamphere v. Brown Univ. in Providence, 712 F. Supp. 1053 (D.R.I. 1989).

[72] *See* The Yearbook of School Law 1985 at 311, Ford v. Nicks, 741 F.2d 858 (6th Cir. 1984).

[73] Ford v. Nicks, 703 F. Supp. 1296 (M.D. Tenn. 1988), *modified*, 866 F.2d 865 (6th Cir. 1989).

In another case where a female faculty member had prevailed in a previous ruling,[75] the court refused to allow damages in the payment of an expert witness for testimony, a damage award not available under title VII.[76]

The Equal Pay Act

In a case filed under a state's equal pay provisions, the court applied proof strategies similar to those used under federal law.[77] The court found that the college's reason for salary inequity, that foreign nationals are willing to take lower salaries than other employees, was a pretext for discrimination in salary based on national origin. The court also awarded back pay under the law for the total time the discrimination existed rather than for a limited time period alleged by the defendant to be defined in the law.

In another case, an insurance company prevailed in a suit over its liability for the award of back pay to female employees discriminated against by a university in the award of salaries.[78] The court affirmed the jury finding that the insurance contract excluded back pay awards.

Title IX

In a Pennsylvania case, a female graduate student brought charges that a male faculty member, with whom she had broken off an affair, continued to harass her by staring at her in public.[79] The court found that the plaintiff failed to state a cause of action under title IX for the male faculty's action. Earlier alleged action of conspiracy by the institution to cover-up her reports of sexual harassment by the faculty member were beyond the two year reach of the statute of limitations within the state.

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[74] Ford v. Nicks, 866 F.2d 865, 877 (6th Cir. 1989).

[75] *See* The Yearbook of School Law 1988 at 232, Denny v. Westfield State College, 669 F. Supp. 1146 (D. Mass. 1987).

[76] Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989).

[77] West Virginia Inst. of Technology v. West Virginia Human Rights Comm'n, 383 S.E.2d 490 (W. Va. 1989).

[78] Continental Casualty Co. v. Anne Arundel Community College, 867 F.2d 800 (4th Cir. 1989).

[79] Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

Age Discrimination in Employment

In Illinois, the EEOC sought a summary judgment in a suit involving charges of retaliation by the state in ceasing any grievance procedures per the institution's policy when an employee commenced action in a state agency or court.[80] The court evaluated the policy established by the collective bargaining agreement and the institution's "good faith effort" of ignoring the policy by completing the grievance procedures for the employee. The court gave the EEOC twenty days to produce evidence to rebut the institution's rationale for the policy and its good faith effort or, otherwise, the court would award summary judgment to the institution.

In another case, the court found that the removal of an employee and his low salary were a result of discrimination based on age.[81] The court found that the actual report by an agent of EEOC contained conclusive findings which the court needed to reach on its own; therefore, the agent's report should be excluded as evidence. Finally, the court refused to grant the award of damages for loss of reputation, emotional distress, and pain and suffering.[82] Age discrimination laws only allow for quantifiable out-of-pocket losses.

Rehabilitation Act

A student with a handicap that affects motor skills failed to complete the clinical skills requirement of an optometry program due to his handicap. The lower court ruled that he was not an otherwise qualified handicapped individual under the law and admission to the program did not result in misrepresentation.[83] However, the jury had found that the institution had breached its contract with the student. A federal circuit court affirmed the lower court opinion but reversed on the breach of contract claim finding that the school, by admitting the student, had not entered into a contract obligating the receipt of the degree.[84]

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[80] EEOC v. Board of Governors of State Colleges and Univ., 706 F. Supp. 1377 (N.D. Ill. 1989).

[81] Smith v. Massachusetts Inst. of Technology, 877 F.2d 1106 (1st Cir. 1989).

[82] McLaren v. Emory Univ., 705 F. Supp. 563 (N.D. Ga. 1988).

[83] *See* The Yearbook of School Law 1988 at 235, Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987).

[84] Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).

Hiring Discrimination

An Iowa veteran petitioned the court to order his appointment to a position with one of the state's universities because he was a veteran.[85] The court found that the law did not mandate the appointment of veterans but required the addition of extra points for veteran status in the job evaluation scheme. The law allowed the employer to hire from the top six candidates within the evaluation scheme. An Ohio court ruled that a change by the prospective employer in the starting date was a counteroffer not an acceptance binding the institution.[86]

FACULTY EMPLOYMENT

Faculty continue to litigate a variety of issues. Nontenured faculty litigation often involves the question of nonrenewal or denial of tenure. Claims range from violations of constitutional rights, federal and state civil rights regulations, and breach of contract claims. Termination of tenured faculty for cause continues as an area of active litigation. Denial of benefits such as the acquisition of rank, retirement, and tuition grants for family members was also litigated this past year.

Nontenured Faculty

First Amendment Freedom of Speech. Free speech issues involved nontenured faculty who were either denied tenure or experienced the nonrenewal of a tenure track contract because of protected speech. In the lead off case, a nontenured faculty member was forced by the dean of the college, a Nigerian, to change the grades in a class after complaints by a Nigerian student. The faculty member's class was disrupted by the dean, and his contract with the institution eventually was not renewed. The federal district court granted summary judgment to the institution on the first amendment claim and dismissed pendent state claims. The Sixth Circuit Court found that the first amendment rights of the faculty member were violated when he was forced to change the grades in this class against his will.[87] While the institution can insist that the professor conform to institutional policies regarding grading, the actual assignment of grades within the policy is protected speech. The violation of first amendment rights would not result if the institution changed the grade, but rather the violation was the action of forcing the professor to change his communication on student performance through the assignment of a specific grade. Furthermore, the court found that the actions of the dean in the classroom, while unprofessional,[88] did not violate the faculty member's academic freedom or first amendment rights. The case was remanded to determine damages.

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[85] Vislisel v. University of Iowa, 445 N.W.2d 771 (Iowa 1989).

[86] Foster v. Ohio State Univ., 534 N.E.2d 1220 (Ohio Ct. App. 1987).

In New Mexico, a faculty member sued the university alleging that he was not rehired because of first amendment pronouncements. The court found that the rehiring decision was based solely on the pronouncements which were matters of public concern, and therefore, were protected speech.[89] The court found that the trial court was correct in awarding damages for emotional distress since the rehiring decision impeded his ability to find another job, resulting in the dissolution of his family. The court ruled that proof of emotional distress did not require corroboration by a medical expert.[90]

In Wisconsin, a nontenured faculty member dismissed because of "whistle blowing" was awarded attorney fees with "enhancement" for the risk of the particular case. On appeal, the court ruled that "enhancement" based on the risk of losing the case was not intended by Congress and would encourage attorneys with marginal cases to the detriment of attorneys filing strong cases.[91]

Nonrenewal or Denial of Tenure. Nonrenewal or denial of tenure cases involve the question of obligations imposed on the institution emanating from the employment contract with probationary faculty. Cases involved the definition of the specific terms of the contract and obligations in the decision not to renew the contract. Denial of tenure cases involved questions of the appropriateness of reasons and access to review materials. Constitutional issues were also raised under both provisions.

A New Jersey institution's decision not to renew probationary faculty contracts was back in court.[92] The plaintiffs claimed that there was an expectation of the award of tenure if they measured up to the record of past tenured faculty.[93] The court found that the plaintiffs had no more than a unilateral subjective expectation and that the university had not abdicated its ability to improve the quality of its permanent faculty through the raising of the standards applied in tenure decisions.

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[87] Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

[88] *Id.* at 831.

[89] Jacobs v. Meister, 775 P.2d 254 (N.M. Ct. App. 1989).

[90] *Id.* at 261.

[91] Board of Regents v. Wisconsin Personnel Comm'n, 433 N.W.2d 273 (Wis. Ct. App. 1988).

[92] *See* Kovats v. Rutgers, 633 F. Supp. 1469 (D.N.J. 1986), *remanded*, 822 F.2d 1303 (9th Cir. 1987).

In Ohio, the court ruled that the award of tenure was not obligated because the faculty member was not evaluated until the seventh year.[94] The seventh year contract contained language stating that this was a terminal contract. However, the court found the institution was obligated to offer an eighth year terminal contract because of the failure to meet the timely notification requirements of the contract. A New York court found that *de facto* tenure cannot exist where formal procedures have been established for the award of tenure.[95] Similarly, the Third Circuit Court found that failure to give timely notice did not result in automatic reappointment with tenure.[96] However, in this case, the court found that the employee had been given adequate notice when it notified her that she would not be recommended for tenure and that her next contract would be a one-year term appointment.

In a case involving a collective bargaining agreement, the court found that an arbitrator could order the reappointment of a faculty member to another one-year probationary contract and another tenure review where the arbitrator found improprieties in the denial of tenure decision.[97] The arbitrator had this authority even though the appointment exceeded the five probationary contract provisions of the collective bargaining agreement. In another case, the court found that the contract was not breached because of the alleged misrepresentations by the dean in the nonrenewal of a probationary faculty member.[98]

Cases involving the denial of tenure were numerous. One case involved allegations that a faculty member was denied tenure because of discrimination based on national origin.[99] The court found that poor administration of a program and a poor publication record were valid reasons for the denial of tenure. In Ohio, the court found that the procedures and the reasons were adequate in a tenure review culminating in denial.[100] In a Puerto Rico case, the court found that the university's tenure review procedures did not create a property right for probationary faculty members requiring due process in the denial of tenure.[101] In this case the department and school committees evaluated the person's performance as satisfactory, while the institutional committee had the authority to make an independent judgment which could contradict the previous recommendations.[102] Similarly, a Mississippi court found that the president had the right to withhold tenure status even when the faculty member earlier had been mistakenly awarded the rank of professor without the proper qualifications.[103]

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[93] Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988).

[94] Omlor v. Cleveland State Univ., 543 N.E.2d 1238 (Ohio 1989).

[95] Meer v. Bugliarello, 537 N.Y.S.2d 617 (App. Div. 1989).

[96] Cohen v. Board of Trustees of Univ. of Medicine and Dentistry of N.J., 867 F.2d 1455 (3d Cir. 1989).

[97] Bloomsburg Univ. of Pa. v. Association of Pa. State College and Univ. Faculties, 552 A.2d 1180 (Pa. Commw. Ct. 1989).

[98] Werblood v. Columbia College of Chicago, 536 N.E.2d 750 (Ill. App. Ct. 1989).

[99] De Wiest v. Tarleton State Univ., 704 F. Supp. 705 (N.D. Tex. 1987).

Access to review materials and committee deliberations were also before the court. The Supreme Court issued an important ruling on an appeal by the University of Pennsylvania.[104] The Court affirmed the lower court decision granting access by EEOC to tenure files and review materials of the plaintiff and other similarly situated males in an investigation of alleged discrimination under title VII in the denial of tenure.[105] The Court found that Congress did not intend academic freedom to insulate the tenure review process from scrutiny. However, the Court reaffirmed the concept of deference to academicians in the actual evaluation of the qualifications of an individual for tenure.

In another access case, a Massachusetts court ordered an institution to grant access to the tenure files in a case involving charges of race, sex, and ancestry discrimination.[106]

In a case involving a challenge to a university chancellor's authority to deny tenure, the court found that the sole authority lay with the board of trustees; therefore, the chancellor could not refuse to forward an application for tenure to the board of trustees.[107] In this case, the university's law faculty had recommended tenure.

Cases also involved allegations of civil rights violations, which this year focused primarily on charges of discrimination. On appeal the Sixth Circuit Court reversed a district court decision[108] finding that the plaintiff's rights under the equal protection clause and title VII had been violated.[109] The procedures used to seek outside reviewers and the consistent negative reading by the department chair of what was perceived by others to be a substantively positive tenure review file were the bases for the court's decision that the female faculty member was a victim of discrimination. The case was remanded for a determination whether extenuating circumstances might require the award of tenure or simply another equitable tenure review.

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[100] Gogate v. Ohio State Univ., 537 N.E.2d 690 (Ohio Ct. App. 1987).

[101] Chinea v. Benitez, 702 F. Supp. 29 (D.P.R. 1988).

[102] *Id.* at 32.

[103] Wicks v. Mississippi Valley State Univ., 536 So. 2d 20 (Miss. 1988).

[104] *See* The Yearbook of School Law 1989 at 214, EEOC v. University of Pa., 850 F.2d 969 (3d Cir. 1988).

[105] University of Pa. v. EEOC, 110 S. Ct. 577 (1990).

[106] Morrison v. Brandeis Univ., 125 F.R.D. 14 (D. Mass. 1989).

[107] Faculty of City Univ. of N.Y. Law School at Queens College v. Murphy, 539 N.Y.S.2d 367 (App. Div. 1989).

In a New York case, the institution claimed that a faculty member had waived any right to file a claim under title VII when she entered into a consent decree which reinstated her with tenure.[110] The court found that the plaintiff did not knowingly waive her right to pursue a state civil rights claim or the claim under EEOC when she signed an agreement not to "initiate further court action."

In a unique case, a medical doctor claimed that he had acquired a faculty position at a university by attempting to create a position for himself.[111] The doctor, granted an appointment as a visiting lecturer giving him nothing more than library privileges, began to attend "grand rounds" and plan a workshop under the institution's name without its approval. The court ruled that title VII covers employees and that courtesy appointments without pay are not covered by the law. In another case a court granted the institution an injunction against relitigation after the court had dismissed the faculty member's title VII case.[112]

Two other cases dealt with liability questions in the denial of tenure decision. In Illinois, the court found that a faculty member was the prevailing party in an out-of-court settlement on the salary discrimination claim but not the tenure claim and, therefore, was entitled to reasonable attorney fees. In another case, a faculty member lost a claim of defamation and damage to his reputation in the recommendations denying tenure submitted by the dean.[113] As reported earlier, a federal court had upheld the procedural accuracy of the denial of tenure decision in this case.[114]

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[108] *See* The Yearbook of School Law 1987 at 248, Gutzwiller v. Fenik, 645 F. Supp. 363 (S.D. Ohio 1986).

[109] Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988).

[110] Kawatra v. Medgar Evers College of the City Univ. of N.Y., 700 F. Supp. 648 (E.D.N.Y. 1988).

[111] Tadros v. Coleman, 717 F. Supp. 996 (S.D.N.Y. 1989).

[112] Zagano v. Fordham Univ., 720 F. Supp. 266 (S.D.N.Y. 1989).

[113] Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).

[114] *See* The Yearbook of School Law 1989 at 213, Staheli v. University of Miss., 854 F.2d 121 (5th Cir. 1988).

Part-time Faculty. In Louisiana, a part-time faculty member sued when the institution failed to pay him for two courses he was scheduled to teach simultaneously.[115] The court upheld the faculty member's allegation that the contract was based on compensation per course taught, not on hours spent in the classroom.

Tenured Faculty

Termination for Cause. The lead off case in this area involved a constitutional question. A faculty member who refused to pay union dues on religious grounds (the union supported and campaigned for a "pro-choice" stance on abortion) was dismissed from his faculty position.[116] In negotiations, the faculty member demanded that all his dues be paid to a charity while the union offered to donate the portion of his dues used for "pro-choice" issues to charity. The court found that denial of all dues payable to the union would be an undue hardship for the union, and inhibit union free speech. In Louisiana, a court found that a faculty member had abandoned his position when he failed to indicate whether he would return the next year after repeated requests for a commitment by the college's administration.[117]

A number of termination for cause cases dealt with procedural issues. In Puerto Rico, a federal court found that a professor achieved tenure while he maintained part-time employment with the institution and prior to commencing full-time employment.[118] The court also ruled that the professor was not given due process by appearing before a faculty committee evaluating the new program.

The Eleventh Circuit Court affirmed a lower court decision that an administrator who retained tenure status from his former faculty position was given due process in his termination for cause.[119] The court found that the procedures used provided adequate due process protection. The reason for termination, chemical dependence which affected work performance, was a valid basis for the decision. In Massachusetts, the court found that a faculty member's due process was not violated when he was terminated for harassing behavior toward students, faculty, and staff.[120] The court found that the appeals procedure which resulted in a review by a committee whose members were reviewing their own decision did not violate the rudiments of due process. In Alabama the court ruled that the termination of a tenured faculty at a public community college did not come under the judicial review requirements for agencies under the state civil procedure laws.[121] A Florida court ruled that the board's attorney, in assisting in the conduct of the termination hearing, did not by his actions bias the deliberations.[122] While in Tennessee, a court ruled that a judicial review of a college's termination decision should take place in the judicial jurisdiction the college is located and denied a change of venue.[123]

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[115] Kethley v. Draughon Business College, Inc., 535 So. 2d 502 (La. Ct. App. 1988).

[116] EEOC v. University of Detroit, 701 F. Supp. 1326 (E.D. Mich. 1988).

[117] Osborne v. Stone, 536 So. 2d 473 (La. Ct. App. 1988).

[118] Collins v. Martinez, 709 F. Supp. 311 (D.P.R. 1989).

[119] Martin v. Guillot, 875 F.2d 839 (11th Cir. 1989).

[120] Harris v. Board of Trustees of State Colleges, 542 N.E.2d 261 (Mass. 1989).

A California case dealt with the termination of a faculty member for "evident unfitness to serve." The court found that the lower court had only looked at the "remediability" test and should look at other criteria established in these types of "fitness" cases.[124] Finally, a professor who was investigated but not terminated for allegations surrounding embezzlement was unable to surmount immunity protections granted to the investigator and auditors.[125]

Termination for Financial Exigency. The termination of faculty resulting from a financial exigency was before the court. California community college faculty terminated because of a financial exigency were successful in establishing their right to part-time, temporary teaching positions offered in the evening by the college.[126] A Colorado court found that termination notices sent by the president but authorized by the board, based on appropriations reductions, were adequate under the state laws governing reduction in staff at community colleges.[127]

In another Colorado case, the plaintiff alleged that the faculty handbook provisions requiring the faculty senate and the curriculum committee to review all curriculum changes were part of the faculty member's contract mandating review by those committees prior to program elimination.[128] The president had recommended and the board had approved program and course changes which resulted in the elimination of the plaintiff's job. The court found the section of the handbook neither obligated the board nor abdicated the board's ultimate authority over programs. The rudiments of due process in a financial exigency, timely notice, pretermination hearing, and the right to challenge the basis for the action, were provided in this case.[129] Finally, a professor waived any right to continued employment when he agreed to remain at the institution during the academic program phase-out period.[130]

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[121] Klein v. State Bd. of Educ., 547 So. 2d 549 (Ala. Civ. App. 1988).

[122] Cotter v. District Bd. of Trustees, 548 So. 2d 731 (Fla. Dist. Ct. App. 1989).

[123] Phillips v. State Bd. of Regents of State Univ. and Community College Sys., 771 S.W.2d 410 (Tenn. 1989).

[124] Bevli v. Brisco, 260 Cal. Rptr. 57 (Ct. App. 1989); *see* The Yearbook of School Law 1986 at 252, Bevli v. Brisco, 212 Cal. Rptr. 36 (Ct. App. 1985).

[125] Rozek v. Topolnicki, 865 F.2d 1154 (10th Cir. 1989).

[126] Daniels v. Shasta-Tehama-Trinity Joint Community College Dist., 260 Cal. Rptr. 867 (Ct. App. 1989).

[127] Craddock v. State Bd. for Community Colleges and Occupational Educ., 768 P.2d 716 (Colo. Ct. App. 1988).

[128] Ahmadieh v. State Bd. of Agriculture, 767 P.2d 746 (Colo. Ct. App. 1988).

Denial of Faculty Privileges. The courts have dealt with questions surrounding the denial of various faculty privileges. For example, the question of a faculty member's denial of promotion to full professor was again before the court.[131] The district court opinion was affirmed on the breach of contract claim,[132] but the case was remanded to determine whether the final review and denial by the personnel committee after a protracted grievance procedure was based on impermissible criteria (i.e., the number of refereed articles).

A faculty member was unsuccessful in his suit to prevent a Jewish Theological Seminary from admitting women to its academic programs.[133] Finally, a district court granted qualified immunity to the institution in a dispute over the procedures used by an institution which censured a female faculty member for "seriously negligent scholarship."[134] However, the case was remanded on the question of whether plagiarism actually occurred and to determine the motivation for the department chair's actions.

ADMINISTRATOR AND STAFF TERMINATION

The dismissal of administrators and staff continues to be an area heavily litigated. The jurisdiction of the courts depends on a number of factors including questions of the statute of limitations. For example, an Illinois court found that a black employee had not filed within the state's 180-day limit under the state human rights laws after his dismissal from a state university.[135]

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[129] *Id.* at 750.

[130] Benoit v. Emory Univ., 381 S.E.2d 394 (Ga. Ct. App. 1989).

[131] Kyriakopoulos v. George Washington Univ., 866 F.2d 438 (D.C. Cir. 1989).

[132] *See* The Yearbook of School Law 1988 at 246, Kyriakopoulos v. George Washington Univ., 657 F. Supp. 1525 (D.D.C. 1987).

[133] Faur v. Jewish Theological Seminary, 536 N.Y.S.2d 516 (App. Div. 1989).

[134] Newman v. Commonwealth of Mass., 884 F.2d 19 (1st Cir. 1989).

A number of cases involved the issue of whether an administrator has a property right that mandates due process in a dismissal decision. The federal circuit court found that a faculty member and department chair who was demoted from the department chair position, was denied due process.[136] The faculty member's due process right was acquired from the college's willingness to give her a hearing that failed to meet the rudiments of due process. The court also ruled that a title VII claim does not preempt the filing of a section 1983 claim.[137] Furthermore, the circuit court found that the lower court could not reinstate a damage award it earlier found to be excessive.

In Mississippi, an institution's take-over of a day care center, while offering current employees the opportunity to compete for next year's available positions, did not establish a property right requiring due process in both the nonrenewal and nonhiring decisions.[138]

A federal circuit court found that a lower court was correct at trial in finding that the procedures at an institution mandated a hearing for a dean removed from that position.[139] The institution was estopped from litigating the property interest issue because previous litigation by another dean at the school had resulted in this plaintiff's summary judgment on the due process issue. While monetary damages were not available, the case was remanded to determine an appropriate injunctive remedy. The Eleventh Circuit Court remanded a case to determine whether a vice president was terminated during a contract period giving him a property right requiring due process.[140]

Several terminations involved allegation of violations of first amendment rights. A federal court in North Carolina denied a motion to dismiss a claim that employees and members of the institution's board were dismissed because they were members of the Democratic Party.[141] The suit of an employee alleging termination based on religious beliefs was dismissed because the public institution's board had immunity under the eleventh amendment; however, claims against individual defendants are still pending.[142]

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[135] Whitaker v. Human Rights Comm'n, 540 N.E.2d 361 (Ill. App. Ct. 1989).
[136] Roberts v. College of the Desert, 861 F.2d 1163 (9th Cir. 1988).
[137] Roberts v. College of the Desert, 870 F.2d 1411 (9th Cir. 1989).
[138] Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989).
[139] Mangaroo v. Nelson, 864 F.2d 1202 (5th Cir. 1989).
[140] Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1988).
[141] McKinney v. Board of Trustees, 713 F. Supp. 185 (W.D.N.C. 1989).

The Tenth Circuit Court affirmed a lower court decision that the first amendment rights of an employee were not violated when his continuation of complaints resulted in his dismissal after the original complaints about safety violations had been investigated and settled.[143] The Eleventh Circuit Court affirmed in part and reversed in part[144] a lower court decision.[145] The court found that it was within the college board's right to control news programming at the college's radio station without inhibiting employees' constitutional rights. The court also affirmed the lower court finding that a property interest in continued employment did not exist. However, issues remain as to whether the employees were retaliated against by termination for the exercise of constitutional rights thereby reversing the lower court summary judgment for the institution. The case was remanded for a determination on the merits.

A federal court in New Mexico issued a summary judgment for the college's board in a case alleging dismissal of a counselor for financial reasons as a pretext for dismissal for political activity.[146]

Several cases involve allegations of discrimination in termination decisions. For example, a Michigan court found that the theft of university property was not a pretext for discrimination based on race.[147] The institution was able to show that over one hundred other whites and blacks were dismissed for theft of university property. On appeal from a federal district court,[148] the Eighth Circuit Court affirmed that a female athletic counselor's termination was made on the basis of gender.[149] Finally, a food service worker was not discriminated against for a physical disability when he was discharged for coming to work with head lice.[150]

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[142] Muhammed v. Board of Supervisors, 715 F. Supp. 732 (M.D. La. 1989).

[143] Seibert v. University of Okla. Health Sciences Center, 867 F.2d 591 (10th Cir. 1989).

[144] Schneider v. Indian River Community College Found., 875 F.2d 1537 (11th Cir. 1989).

[145] *See* The Yearbook of School Law 1989 at 223, Schneider v. Indian River Community College Found., Inc., 684 F. Supp. 283 (S.D. Fla. 1987).

[146] Bates v. Board of Regents, 699 F. Supp. 1489 (D.N.M. 1988).

[147] Sisson v. Board of Regents, 436 N.W.2d 747 (Mich. Ct. App. 1989).

[148] *See* The Yearbook of School Law 1988 at 245, Gray v. University of Ark. at Fayetteville, 658 F. Supp. 709 (W.D. Ark. 1987).

[149] Gray v. University of Ark. at Fayetteville, 883 F.2d 1394 (8th Cir. 1989).

[150] Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989).

Other administrator termination cases involved questions of the terms of the contract. A Mississippi case was remanded to determine whether a fixed term contract existed and whether the administrator was defamed when the annual appointment was publicly announced by the president and later recanted based on pressure from various parties within the institution.[151] In Michigan, the court found that a dismissed employee could not seek action in court when he failed to follow the grievance procedures spelled out in the collective bargaining agreement.[152]

A Colorado court ruled that the rights to an appeal must be included in a notice to terminate.[153] In Idaho, a court ruled that the failure of a dismissed employee to exhaust administrative remedies precluded a claim in state court.[154]

The Sixth Circuit Court reviewed a lower court finding that two white male deans had been the victims of discrimination in their dismissal from the college.[155] The court found that issues existed requiring litigation on the plaintiffs' defamation claim against the president's executive secretary. The court also remanded the case for a determination of whether the damage awards were excessive or appropriate given the lack of instructions on municipal liability.

ALL EMPLOYEES

Sexual Harassment

The sole case in this area involved a damage award found to be excessive.[156] The award was made for mental anguish and humiliation resulting from sexual harassment and was modified to an appropriate amount.

Denial of Employee Benefits

Employee benefits continue to be litigated. The lead off case involves the question of whether tuition assistance grants to employees are taxable income.[157] The Second Circuit Court affirmed the tax court ruling that tuition grants under the tax laws were taxable income.

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[151] Holland v. Kennedy, 548 So. 2d 982 (Miss. 1989).

[152] Dahlman v. Oakland Univ., 432 N.W.2d 304 (Mich. Ct. App. 1988).

[153] Salas v. State Personnel Bd., 775 P.2d 57 (Colo. Ct. App. 1988).

[154] Pounds v. Denison, 766 P.2d 1262 (Idaho Ct. App. 1988).

[155] Chonich v. Wayne County Community College, 874 F.2d 359 (6th Cir. 1989).

[156] SUNY College of Envtl. Science and Forestry v. State Div. of Human Rights, 534 N.Y.S.2d 270 (App. Div. 1988).

[157] Knapp v. Commissioner, 867 F.2d 749 (2d Cir. 1989).

In Louisiana, the seniority of a classified employee who resigned under duress and later was reinstated was in question.[158] Because of a compromise agreement which reinstated the employee, the time between the resignation and reinstatement should be viewed as leave without pay and time accrued toward seniority. Because of his seniority, he was not the proper candidate for subsequent layoff under the civil service code. In Washington, the court found that the subsequent collective bargaining agreement settled the question of wages accrued from professional improvement credits.[159]

Several cases address questions concerning retirement funds. In Montana, a court ruled that a retirement agreement waived all claims emanating from contract conversions occurring nineteen years earlier.[160] The Second Circuit Court ruled that a New York optional retirement program did not come under the Employee Retirement Income Act of 1974[161] entitling a widow to surviving spouse annuity under the Federal Act.[162] The court found that an annuity retirement plan constituted a "spendthrift trust" exempt in chapter 7 bankruptcy.[163] However, retirement income from an Ohio State Teachers Retirement System could be ordered to be paid to a chapter 13 trustee in a bankruptcy case.[164]

Unemployment compensation qualification questions were also before the courts. In Florida, the court found that a secretary had made a good faith effort to provide information about her illness and had not abandoned her job, and thus was qualified for unemployment compensation.[165] A nonprofit private corporation affiliated with the university was obligated to pay unemployment compensation to a student in its employ since it was not an educational institution.[166] A California court found that instructors were qualified for unemployment compensation between the fall and spring semesters when they had not received reasonable assurance that the positions would continue in the spring term.[167] A Pennsylvania court found that a counselor was qualified for unemployment benefits during the summer since there was no assurance the contract would be renewed.[168] However, another Pennsylvania court found that an employee had voluntarily resigned from his position rather than being forced out by intolerable work conditions emanating from the school's opinion of his public protesting activities; therefore, he did not qualify for unemployment compensation.[169]

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[158] Maradiaga v. University of New Orleans, 546 So. 2d 579 (La. Ct. App. 1989).

[159] Yates v. State Bd. for Community College Educ., 773 P.2d 89 (Wash. Ct. App. 1989).

[160] Sperry v. Montana State Univ., 778 P.2d 895 (Mont. 1989).

[161] 29 U.S.C. § 1001 *et seq.*

[162] Roy v. Teachers Ins. and Annuity Ass'n, 878 F.2d 47 (2d Cir. 1989).

[163] *In re* Montgomery, 104 Bankr. 112 (N.D. Iowa 1989).

[164] *In re* Simmons, 94 Bankr. 74 (W.D. Pa. 1988).

[165] Florida State Univ. v. Florida Unemployment Appeals Comm'n, 548 So. 2d 768 (Fla. Dist. Ct. App. 1989).

[166] *In re* Organization of Ancillary Servs. of State Univ. College at Oneonta, N.Y., 543 N.Y.S.2d 558 (App. Div. 1989).

Collective Bargaining

Collective bargaining issues, such as the designation of the bargaining unit, unfair labor practices, and controversy surrounding the grievance procedures were before the court this year.

Classified employees of a California community college were joint employees of the college and the city. The labor relations board had ruled that they were sole employees of the city eligible to bargain collectively. The court remanded the case, finding that they were joint employees.[170]

In a case following the precedent of *Yeshiva,*[171] the court found that the faculty did have decision authority making them "managerial" and ineligible to bargain collectively.[172] A New Hampshire court found that university firemen could form a bargaining unit but it was error to include the fire captain, a "managerial employee," within the bargaining unit.[173]

Several cases involved the collection of union fees and the protection of first amendment rights. In Michigan, a nonmember objected to the payment of union dues because the union lobbied for and supported the "pro-choice" side of the abortion issue.[174] In another case a nonmember objected to union activities which included lobbying for public education appropriations. The court found that union fees expended for political activity which could reasonably be attributed to the representation duties of the bargaining organization were assessable union charges free of constitutional prohibitions. The court also found that costs for the preparation of a strike and public relations were also chargeable fees. However, a Massachusetts court found that the failure of a union to explain how its service fee was distributed between the local, state, and national organizations was a violation of nonmember's constitutional rights.[175] The rebate procedures and the review procedures on challenging the rebate were also flawed.

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[167] 167. Cervisi v. Unemployment Ins. Appeals Bd., 256 Cal. Rptr. 142 (Ct. App. 1989).

[168] 168. Lock Haven Univ. of Pa. v. Commonwealth Unemployment Compensation Bd. of Review, 559 A.2d 1015 (Pa. Commw. Ct. 1989).

[169] 169. Rosenberg v. Commonwealth Unemployment Compensation Bd. of Review, 560 A.2d 292 (Pa. Commw. Ct. 1989).

[170] 170. United Pub. Employees, Local 790 v. Public Employment Relations Bd., 262 Cal. Rptr. 158 (Ct. App. 1989).

[171] 171. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

[172] 172. David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157 (6th Cir. 1989).

[173] 173. Appeal of Univ. Sys. of N.H., 553 A.2d 770 (N.H. 1988).

[174] 174. Lehnert v. Ferris Faculty Ass'n, 707 F. Supp. 1473 (W.D. Mich. 1988), *aff'd*, 881 F.2d 1388 (6th Cir. 1989); *see also* The Yearbook of School Law 1987 at 258, Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306 (W.D. Mich. 1986).

A California case involved the question of whether a reorganization scheme violated the collective bargaining agreement.[176] The court found that a subsequent collective bargaining agreement and memorandum of understanding waived any liability for the reorganization scheme which moved some decisions from the department chair to the dean. In Illinois, a union charged that it was an unfair labor practice for the institution to sign a contract and pay money to a private security firm to provide security on campus.[177] The court found that the determination of this issue was solely under the jurisdiction of the state labor relations board.

Discharge for financial exigencies resulted in an Illinois community college board bringing an appeal to avoid submitting to binding arbitration.[178] The court ruled it lacked jurisdiction. A Pennsylvania court found that questions of retrenchment were issues over which the arbitrator possessed subject matter jurisdiction.[179]

A New York court found that once a party seeks arbitration it cannot contest the authority of the arbitrator to decide the issue.[180] In Vermont, the labor relations board upheld an institution's decision not to pay a faculty member for a sabbatical when he was on a leave without pay. The court affirmed the labor relation board's decision.[181] Failure to file a grievance precluded a breach of contract claim in a New York court.[182]

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[175] Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union, 537 N.E.2d 1237 (Mass. 1989).

[176] Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., 258 Cal. Rptr. 302 (Ct. App. 1989).

[177] Teamsters Local 525 v. Board of Trustees, 544 N.E.2d 47 (Ill. App. Ct. 1989).

[178] Board of Trustees v. Prairie State College Fed'n of Teachers, Local 3816, 540 N.E.2d 794 (Ill. App. Ct. 1989).

[179] State Sys. of Higher Educ. v. Association of Pa. State College and Univ. Faculties, 550 A.2d 1385 (Pa. Commw. Ct. 1988).

[180] *In re* State (State Univ. of N.Y., Binghamton), 538 N.Y.S.2d 641 (App. Div. 1989).

STUDENTS

The litigation brought before the courts by students and by various administrative offices and agencies related to student exhibits, both continuity with ongoing issues and the emergence of new contentions. In the area of financial aid, the boundaries of federal authority were challenged in a variety of states, while student loan defaults and bankruptcies increasingly came before the court. Prospective college students challenged the award of merit scholarships based on an alleged gender-discriminatory standardized test. Student civil rights actions continue to be litigated but represent a limited number of contested constitutional freedoms. Academic and disciplinary dismissals were predominantly contested by graduate students while fewer cases involving undergraduates were litigated.

Admissions

In Kansas, after unsuccesfully applying to medical school in 1984, 1985, and 1986, a white male sought a preliminary injunction to direct the university to admit him as a first-year medical student, pending his civil rights action against university officials.[183] The court determined that a title VI action in this case would be time-barred due to the state's two-year statute of limitations. Additionally, the applicant failed to demonstrate that race was the prevailing factor in his rejection entitling him to injunctive relief.

Nonresident Tuition

In separate suits in separate states, two law students challenged their residency classification as nonresidents for tuition at two universities. After exhausting a university's administrative appeal system, a law student filed suit to determine his status as an in-state resident. On review, a state court reversed a previous decision granting in-state status.[184] The court determined that the student's voter registration, military domicile records, income tax records, and self-reported address on a law admissions examination application indicated out-of-state residence. The court further determined that the university residence committee was not obligated to state reasons for its rejection of a student's application for in-state resident status.

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[181] Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 561 A.2d 417 (Vt. 1989).

[182] Neiman v. Kingsborough Community College, 536 N.Y.S.2d 843 (App. Div. 1989).

[183] Baker v. Board of Regents, 721 F. Supp. 270 (D. Kan. 1989).

In a Wisconsin case, the court upheld both a lower court and the university residency committee's ruling that a law student remain classified as a nonresident for tuition purposes.[185] The university did not violate the student's right to due process nor to equal protection when it found that his move to the state and his subsequent activities were primarily associated with his educational objectives.

Financial Aid

Recent attempts to control spending in federal government programs and to reduce defaults in the student loan programs have broached a variety of new issues before the court. Four state guaranty agencies have resisted a statute[186] emanating from the United States Department of Education (DOE) that requires the agencies to reduce excess funds in their cash reserves by transfer to the Department. In Delaware, the state agency challenged the constitutionality of the statute.[187] Despite a motion for dismissal by DOE, the court determined that the issue was ripe for judicial review. A Wisconsin court denied a preliminary injunction to prevent the DOE from withholding reinsurance payments to the state guaranty agency,[188] and indicated that the agency had an available remedy in claims court through the Tucker Act.[189] The same agency challenged the constitutionality of the excess cash reserve amendments to the Higher Education Act, claiming that property rights had been violated without compensation. The court granted a summary judgment for DOE.[190] However, an Ohio state guaranty agency, proving that the majority of its cash reserves were state generated and that the agency held a vested contractual right to reinsurance payments from the federal government, prevailed in the question of the validity of DOE's recovery of excess cash reserves. The court held the federal statute to be unconstitutional.[191] Similarly, a court in South Carolina held that DOE could not withhold reinsurance and administrative cost payments to the guaranty agency since a vested contractual property right existed.[192]

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[184] Wilson v. State Residence Comm., 374 S.E.2d 415 (N.C. Ct. App. 1988).

[185] DeCecco v. Board of Regents, 442 N.W.2d 585 (Wis. Ct. App. 1989).

[186] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. §§ 1330 *et seq.*

[187] State v. Bennett, 697 F. Supp. 1366 (D. Del. 1988).

[188] Great Lakes Higher Educ. Corp. v. Cavazos, 698 F. Supp. 1464 (W.D. Wis. 1988).

[189] 28 U.S.C. § 1491(a).

[190] Great Lakes Higher Educ. Corp. v. Cavazos, 711 F. Supp. 485 (W.D. Wis. 1989).

Several cases involved institutional eligibility rules for participation in and government recovery of funds in federal and state student assistance programs. The absence of due process in the termination of eligibility for two educational institutions provided controversy. Without an evidentiary hearing, DOE terminated the program eligibility of a for-profit correspondence and residential training institution for deficiencies in the length of the course. Since DOE deemed the institution eligible to participate since 1980, the court admonished DOE in creating "retrospective fiction" by declaring the institution ineligible and held that the school's property and liberty rights required due process.[193] In a second case, the court determined that DOE did not have the authority to take emergency action to terminate a university's participation in student financial assistance programs without reasonable notice and an evidentiary hearing prior to suspension.[194] In New York, two proprietary institutions lost eligibility for state student assistance programs when the state comptroller alleged that teachers at the institutions lacked proper credentials and improper certification of student eligibility had occurred. The operator of one private New York business school appealed its previously dismissed petition to annul the audit and to release escrow funds; the court reversed the lower court's dismissal.[195] In the second case involving the other New York proprietary school, the court upheld the state's recovery of overpayments to the school on the basis of inadequate teacher qualifications and of ineligible payments for students on a leave of absence.[196] Finally, a Fifth Circuit Court decided that DOE could recover payments on defaulted loans made to a proprietary institution based on alleged violations of "points and premiums" regulations.[197]

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[191] Ohio Student Loan Comm'n v. Cavazos, 709 F. Supp. 1411 (S.D. Ohio 1988).

[192] South Carolina State Educ. Assistance Auth. v. Cavazos, 716 F. Supp. 886 (D.S.C. 1989).

[193] Continental Training Serv., Inc. v. Cavazos, 709 F. Supp. 1443 (S.D. Ind. 1989).

[194] Ross Univ. School of Medicine v. Cavazos, 716 F. Supp. 638 (D.D.C. 1989).

[195] N.J. Koss, Inc. v. Regan, 539 N.Y.S.2d 579 (App. Div. 1989).

[196] Royal Business School, Inc. v. New York State Dep't of Educ., 534 N.Y.S.2d 489 (App. Div. 1988).

In Rhode Island, the court ruled that the nature of the services of a student loan service corporation is proprietary, not governmental, and that a fifteen year contract between the corporation and the state guaranty agency that extends beyond the terms of the state guaranty agency's directors is valid.[198]

Alleged fraudulent behavior was involved in a number of cases brought before the court. Former students of a recently bankrupt college sought rescission of student loans.[199] The court held that students did not have private rights of action under the Higher Education Acts so that rescission was not a permissible remedy for alleged fraudulent misrepresentation to students. A Texas court denied a motion by an unaccredited institution to dismiss a claim alleging racketeering.[200] The court held that the student had standing to bring the action and had demonstrated an alleged pattern of mail fraud that included student financial aid activity. Another student, a prison inmate, alleged fraudulent receipt of federal Pell Grant funds by his college, based on his full-time enrollment. The court determined that since the inmate did not suffer actual or threatened injury, he did not have standing as an individual or as a taxpayer, and dismissed the action.[201] In Illinois, the state appealed a lower court dismissal of fraud charges against an individual who allegedly falsified federal student loan information.[202] The appellate court reversed and remanded the case, holding that the state had a concurrent interest in punishing fraud and that federal statutes establishing the National Direct Student Loan program prohibit state administrative involvement, but not recovery of state funds fraudulently obtained.

Questions concerning individual eligibility in student financial assistance loans were brought to court in four separate cases. In Missouri, a graduate student appealed a decision that she had received an overpayment through the Aid to Families with Dependent Children (AFDC) program.[203] The court remanded the case so that her educational expenses, books, fees, equipment, and child care expenses necessary for school attendance, would be deducted from her student loan prior to calculations of AFDC benefits. The Secretary of Agriculture appealed a summary judgment that decided the effective date of the Food Security Act amendment[204] and excluded student loan origination fees in the calculation of a food stamp recipient's income.[205] Affirming the lower court's decision, the Eighth Circuit Court held that the amendment, which expressly excluded lender-retained student loan fees, was effective on enactment, not on the issuance of implementing rules determined by the Secretary. In Wisconsin, the court upheld a state guaranty agency's rejection of a previously bankrupt debtor's application for a second state guaranteed student loan.[206] Since a student loan is not a grant, state eligibility rules that allow the denial of future extension of credit to a debtor whose original student was discharged in bankruptcy proceedings did not violate federal rules prohibiting discrimination in the issuance of licenses, permits, charters, franchises, or similar grants.[207]

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[197] LTV Educ. Sys., Inc. v. Bell, 862 F.2d 1168 (5th Cir. 1989).

[198] Rhode Island Student Loan Auth. v. Nels, Inc., 550 A.2d 624 (R.I. 1988).

[199] Graham v. Security Savings and Loan, 125 F.R.D. 687 (N.D. Ind. 1989).

[200] Gonzalez v. North American College of La., Inc., 700 F. Supp. 362 (S.D. Tex. 1988).

[201] Abraham v. Marist College, 706 F. Supp. 294 (S.D.N.Y. 1989).

[202] People v. Brom, 541 N.E.2d 745 (Ill. App. Ct. 1989).

[203] Danner v. Division of Family Serv., 772 S.W.2d 868 (Mo. Ct. App. 1989).

Student eligibility for loans and grants to enroll in religious educational programs were also at issue. A visually handicapped student appealed the denial of state financial vocational assistance for the purpose of attending a private Bible college and pursuing a religious education degree.[208] The Supreme Court of Washington affirmed that the state constitution prohibited the application of public monies to religious instruction and that the denial of aid was not a violation of the free exercise or the equal protection clauses.

In a suit against the state department of education, class certification was granted to ten New York state high school students, two organizations, and extended to all female high school seniors in New York State.[209] The students alleged that the state's exclusive reliance on Scholastic Aptitude Test scores to award state merit scholarships discriminated against female students in violation of the equal protection clause of the fourteenth amendment.

Bankruptcy cases under both chapter seven and chapter thirteen were brought before the court. With regard to a resolved bankruptcy case, a former client sued his bankruptcy attorney for negligent representation in failing to distinguish the ramifications for a student loan between chapter seven and chapter thirteen bankruptcy proceedings.[210] The court remanded the case to the trial court to determine and impose sanctions against the attorney in addition to the previously determined plaintiff compensation.

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[204] Food Stamp Act of 1977, §§ 2 *et seq.*, as amended 7 U.S.C.A. §§ 2011 *et seq.*

[205] Metzer v. Lyng, 864 F.2d 75 (8th Cir. 1988).

[206] Elter v. Great Lakes Higher Educ. Corp., 95 Bankr. 618 (E.D. Wis. 1989).

[207] 11 U.S.C. § 525(a).

[208] Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).

[209] Sharif v. New York State Educ. Dep't, 127 F.R.D. 84 (S.D.N.Y. 1989).

Student loans were not discharged in a variety of cases: the debtor had the present and/or future ability to meet financial obligations without undue hardship,[211] an ex-spouse or parent as primary debtor was responsible for the student loan while not receiving benefits from the loan,[212] and the bankruptcy petition was filed prior to the five year rule for filing chapter seven bankruptcy.[213] In several cases, educational loans were discharged: the debts would impose undue hardship on the debtor,[214] and the added expense of repayment of the student loan would violate the fresh start policy of the bankruptcy code.[215]

A variety of chapter thirteen cases were brought before the court. A motion to reopen their chapter thirteen case was brought by debtors in an attempt to include a state guaranty agency that had been omitted in their original list.[216] The motion was denied, leaving the debtors in jeopardy of a future lawsuit with the agency. Four chapter thirteen plans were not confirmed: one plan that proposed full payment of the student loan and only 10% of other remaining loans was deemed discriminatory,[217] another plan did not include the debtor's nursing school, a claimant in the education loans,[218] and two plans included nondischargeable Health Education Assistance

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[210] Swanson v. Sheppard, 445 N.W.2d 654 (N.D. 1989).

[211] Bey v. Dollar Savings Bank, 95 Bankr. 376 (W.D. Pa. 1989); Cahill v. Norstar Bank of Upstate N.Y., 93 Bankr. 8 (N.D.N.Y. 1988); Cardwell v. Higher Educ. Assistance Found., 95 Bankr. 121 (W.D. Mo. 1989); Coleman v. Higher Educ. Assistance Found., 98 Bankr. 443 (S.D. Ind. 1989); Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 310 (W.D. Pa. 1989); Gearhart v. Clearfield Bank & Trust Co., 94 Bankr. 392 (W.D. Pa. 1989).

[212] Education Resources Inst., Inc. v. Hammarstrom, 95 Bankr. 160 (N.D. Cal. 1989); Education Resources Inst., Inc. v. Selmonosky, 93 Bankr. 785 (N.D. Ga. 1988); Taylor v. Tennessee Student Assistance Corp., 95 Bankr. 550 (E.D. Tenn. 1989).

[213] Avila College v. Bunger, 99 Bankr. 453 (D. Kan. 1989); Rahlf v. Illinois State Scholarship Comm'n, 95 Bankr. 572 (N.D. Ill. 1988); Shryock v. Pittsburg State Univ., 102 Bankr. 217 (D. Kan. 1989).

[214] Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 308, 309 (W.D. Pa. 1989); Harris v. Pennsylvania Higher Educ. Assistance Agency, 103 Bankr. 79 (W.D.N.Y. 1989).

[215] Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 306, 309 (W.D. Pa. 1989).

[216] *In re* Simonis, 92 Bankr. 807 (E.D. Wis. 1988).

[217] *In re* Lawson, 93 Bankr. 979 (N.D. Ill. 1988).

[218] *In re* Joiner, 93 Bankr. 130 (N.D. Ohio 1988).

Loans.[219] Finally, two chapter thirteen plans were confirmed that were proposed in "good faith."[220]

The United States brought suit against a number of National Health Service Corporation Scholarship recipients who defaulted on their service obligation.[221] In another default case, the physician failed to substantiate his claim that his medical incompetence prevented completion of his service contract.[222]

The repayment of student loans produced a variety of controversies. A district court affirmed the right of the United States to collect a student loan even though a state statute of limitations expired before a national defense student loan was assigned to the DOE.[223] The Third Circuit Court affirmed a lower court decision that a former student's suit against various court judges alleging erroneous rulings in his dispute over his student loan obligation was frivolous but remanded the case to clarify the court order to restrict further litigation in this matter only.[224] A state employee with student loan obligations brought a class action suit against the state for failure to provide due process before withholding income for repayment. An appeals court rendered the case moot since the state had changed its procedures for collecting past-due student loans. The case was remanded though for redetermination of the certifying class; some plaintiffs might have student loan debts to lending institutions other than the state guaranty agency covered in the suit.[225] The court upheld the Department of Education's action to offset a defaulted educational loan against the plaintiff's income tax return even though the six-year statute of limitations would have barred collection by other means.[226] In Colorado, the Supreme Court reversed and remanded a student loan garnishment case. The court held that a creditor could not garnish the proceeds of a guaranteed student loan in order to collect a debt previously owed by the student.[227] A veteran appealed a lower court determination of overpayment of veterans' educational benefits.[228] The case was reversed and remanded due to judicial procedural error: the decision was written in the margin of the government's motion and not filed as a separate document.

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[219] *In re* Battrell, 105 Bankr. 65 (D. Ore. 1989); United States v. Quinn, 102 Bankr. 865 (M.D. Fla. 1989).

[220] *In re* Dornon, 103 Bankr. 61 (N.D.N.Y. 1989); *In re* Winthurst, 97 Bankr. 457 (C.D. Ill. 1989).

[221] United States v. Barry, 719 F. Supp. 1047 (M.D. Ala. 1989); United States v. Cooper, 699 F. Supp. 69 (W.D. Pa. 1988); United States v. Dillingham, 104 Bankr. 505 (N.D. Ga. 1989); United States v. Duffy, 879 F.2d 192 (6th Cir. 1989); United States v. Hatcher, 716 F. Supp. 447 (S.D. Cal. 1989); Rendleman v. Bowen, 860 F.2d 1537 (9th Cir. 1988).

[222] United States v. Martin, 710 F. Supp. 271 (C.D. Cal. 1989).

[223] United States v. Hunter, 700 F. Supp. 26 (M.D. Fla. 1988).

[224] Chipps v. United States Dist. Court for the M.D. of Pa., 882 F.2d 72 (3d Cir. 1989).

[225] Toney v. Burris, 881 F.2d 450 (7th Cir. 1989).

[226] Roberts v. Bennett, 709 F. Supp. 222 (N.D. Ga. 1989).

Child support in the form of assistance for college expenses required in divorce decrees was the subject of four cases. Modifications were ordered in two decrees: a mother was required to increase her financial support of two sons until they are twenty-two years of age as long as they remain full-time students,[229] and a father received credit for the money he spent in sending his child to college against his child support arrearage and had his child support payment to his ex-wife reduced while he supported their child in college.[230] In another case, a mother petitioned the court to hold a father in contempt for failure to pay their child's tuition and book expenses.[231] The court held that an alleged agreement between the daughter and father that the father's provision of a car and related expenses in lieu of college expenses did not satisfy the requirements of the divorce decree since it was not approved by a trial court. Finally, in Pennsylvania, the court considered whether an adult child's willful estrangement from a noncustodial parent excused the parent from contributing to the child's college education.[232] The child's original plea for support from his mother was upheld by a lower court; the mother appealed and the court, holding the emancipated, post majority child responsible for his actions toward his mother, vacated the support decision.

First Amendment

Freedom of Speech. A case that has been before the court since 1986 finally reached the Supreme Court only to be reversed and remanded to the court of appeals.[233] *Certiorari* was granted in a case concerning commercial free speech. Originally denied the right to hear sales activities in their dormitory rooms, the students appealed. The appellate court upheld the students' constitutional right to receive information in their rooms. The Supreme Court remanded the case and held that governmental restrictions upon commercial speech do not have to be the least restrictive to achieve the desired end.[234] The distinction between speech for profit (job counseling or legal advice) and speech that proposes a profit (promotion of a product) must be delineated in an as-applied analysis which neither lower court considered.

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[227] Schaerrer v. Westman Comm'n Co., 769 P.2d 1058 (Colo. 1989).

[228] United States v. Woods, 885 F.2d 352 (6th Cir. 1989).

[229] *In re* Marriage of Hasley, 433 N.W.2d 40 (Iowa Ct. App. 1988).

[230] Grisham v. Johnson, 532 So. 2d 1260 (Ala. Civ. App. 1988).

[231] Holliman v. Holliman, 539 So. 2d 310 (Ala. Civ. App. 1988).

[232] Milne v. Milne, 556 A.2d 854 (Pa. Super. Ct. 1989).

[233] *See* The Yearbook of Education Law 1989 at 233, Fox v. Board of Trustees, 841 F.2d 1207 (2d Cir. 1988); *see also* The Yearbook of Education Law 1988 at 254, Fox v. Board of Trustees, 649 F. Supp. 1393 (N.D.N.Y. 1986).

Students at a state university brought suit challenging the trustees' termination of a legal services office.[235] On appeal, the court affirmed that the office was not a forum, that the student activity fees do not belong to the students but are part of the general funds over which the trustees have authority to disperse, and that the termination of the subsidy for the legal services office did not violate the students' first amendment rights.[236]

In Alabama, on appeal, students interested in running for office challenged their public university student government regulations restricting the time and place for the distribution of campaign literature and the exercise of open debate.[237] The Court of Appeals affirmed that the regulations were reasonably related to the university's legitimate interest in minimizing the disruptive effect of campus elections and did not violate students' first amendment rights.

Two cases involved student newspapers and allegations of libel. On appeal from a summary judgment, a professor at a private college in New York brought action to recover damages for libel when the student newspaper printed letters to the editor that were allegedly defamatory of his abilities as a teacher.[238] The court affirmed that the letters were opinion and not actionable since the Constitution protects the free expression of ideas even if false and libelous. In a second case, a college administrator sought recovery from an alleged defamation in a "spoof" edition of the college newspaper.[239] In a summary judgment for the defendants, the court determined that a parody that no reasonable person would read as a factual statement cannot be actionable as defamation, and that the action was protected expression of opinion absolutely privileged under the first amendment and the state constitution.

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[234] Board of Trustees v. Fox, 109 S. Ct. 3028 (1989).

[235] *See* The Yearbook of Education Law 1989 at 232, Student Gov't Ass'n v. Board of Trustees, 676 F. Supp. 384 (D. Mass. 1987).

[236] Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473 (1st Cir. 1989).

[237] Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).

[238] Epstein v. Board of Trustees, 543 N.Y.S.2d 691 (App. Div. 1989).

[239] Walko v. Kean College of N.J., 561 A.2d 680 (N.J. Super. Ct. Law Div. 1988).

Dismissal

Disciplinary Dismissal. Five cases brought distinct questions involving disciplinary dismissal before the court during this reporting period. Two cases pertained to behavior related to professional expectations. In Louisiana, a licensed dental hygienist appealed a denied injunction to lift his expulsion from a public university dental school for violating its Professional Conduct Code.[240] The court held that he had been afforded appropriate due process. An expelled law student, convicted of false use of a credit card, appealed his breach of contract action against the university.[241] In the lower court action, the student had elected to have a jury decide if the university had not followed its published procedures for reinstatement. The appeals court affirmed that state law precluded review of the jury's finding that the contract had not been breached.

In a media-celebrated case of alleged harassment and counterharassment involving a black professor and white college students, members of a noncollege student newspaper staff brought a civil rights action against a private college and its administrators, alleging that their suspension from the college deprived them of their contractual rights under title VI.[242] The court granted the college's dismissal motion ruling that the students' allegations of racial animus connected with their suspension were insufficient to sustain the claim.

A former student at a public university who had been prohibited from the campus, appealed a criminal trespass conviction.[243] Since the prohibition became void according to its own criteria, when, through administrative oversight, the student was readmitted, the court reversed the criminal conviction. The court additionally remanded the case to inspect alleged jury misconduct.

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[240] Barletta v. State, 533 So. 2d 1037 (La. Ct. App. 1988).
[241] Warren v. Drake Univ., 886 F.2d 200 (8th Cir. 1989).
[242] Dartmouth Review v. Dartmouth College, 709 F. Supp. 32 (D.N.H. 1989).
[243] Bader v. State, 777 S.W.2d 178 (Tex. Ct. App. 1989).

In a previous case involving plagiarism,[244] a dismissed law student requested documents allegedly relevant to his case from the public university under the Freedom of Information Act.[245] The appeals court, affirming the lower court's dismissal of the action, determined that there was insufficient evidence to show that the university was in possession of the memo and that the court could not order its production under the Freedom of Information Act if it could not be found.

Academic Dismissal. Of the fifteen cases reported here concerning academic dismissal brought before the courts, only two of the actions have been raised by undergraduate students. The remaining thirteen cases involve graduate and professional students in conflict with their universities. The issues entail charges of breach of contract, due process challenges, racial discrimination, and sexual harassment.

A student, terminated from a community college nuclear medicine technology program, appealed her breach of contract and negligence suit against the community college district.[246] The court affirmed that the community college's alleged violation of immediate supervision was not a basis for recovery in negligence and that the plaintiff had no claim against the district for failing to provide an education to her. In Connecticut, a first year law student who failed to maintain a minimum grade point average, appealed his reinstatement on the grounds of fraud and breach of contract.[247] The appellate court found no error in the lower court's ruling that no fraud existed when the university advertised student representation on committees and friendly student-faculty relations and that no contract was breached in the housing of students.

Five students challenged their academic dismissals on the grounds of lack of due process. In New York, a law student appealed her dismissal for deficiency in grade point average.[248] The appellate court, reversing the lower court's dismissal, but refusing to intervene in a controversy over academic standards, remanded the case back to the university to reconsider if one course grade was a rational exercise of discretion by the course professor.

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[244] *See* The Yearbook of School Law 1989 at 235, Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988); *see also* The Yearbook of School Law 1987 at 266, Easley v. University of Mich. Bd. of Regents, 632 F. Supp. 1539 (E.D. Mich. 1986); 627 F. Supp. 580 (E.D. Mich. 1986); The Yearbook of School Law 1986 at 272, 619 F. Supp. 418 (E.D. Mich. 1985).

[245] Easley v. University of Mich., 444 N.W.2d 820 (Mich. Ct. App. 1989).

[246] Chevlin v. Los Angeles Community College Dist., 260 Cal. Rptr. 628 (Ct. App. 1989).

[247] Gold v. University of Bridgeport School of Law, 562 A.2d 570 (Conn. Ct. App. 1989).

[248] Susan M. v. New York Law School, 544 N.Y.S.2d 829 (App. Div. 1989).

A dental resident, appealing his termination from a university's general practice residency program, claimed that his dismissal was retaliation for his exercise of first amendment rights and that the dismissal procedures violated his fourteenth amendment rights to procedural due process since he maintained a protected property interest in his contractual employment with the university.[249] The lower court dismissed the due process claim while the fourteenth amendment claim remained alive. The appeals court affirmed that the dismissal did not violate due process and that the resident did not suffer damages since his contracted stipend was paid in full. In a similar case in Minnesota, a resident in a university's psychiatric residency program appealed his dismissal on the grounds of breach of contract, substantive and procedural due process, and defamation.[250] The court held that the resident, in this particular context, was a student rather than an employee; therefore, no breach of contract occurred in his dismissal and academic due process was afforded. The letter of dismissal communicating advice for remediation sent only to the student was not defamatory. Officials of a public university medical school appealed a permanent injunction against the wrongful dismissal of a medical student.[251] The court of appeals reversed the lower court's decision after reviewing and finding neither a violation in the procedural due process afforded the student nor substantially different treatment from other students. Finding error with the lower court's breach of authority in overriding the academic judgment of the school officials, the court determined that the express disclaimers of "subject to change" and "do not constitute an irrevocable contract" placed in the catalogue prohibit the conclusion of an enforceable contract between the student and the university. The Seventh Circuit Court on remand from the Supreme Court reconsidered a case in which nursing students alleged that they were deprived of substantive due process in their dismissal from a nursing school.[252] On a technical error, the appeals of all of the nursing students in a class action, except for the student named in the notice of appeal, were dismissed. With respect to the named student, the district court decision of qualified immunity to the school officials was reinstated.

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[249] Davis v. Mann, 882 F.2d 967 (5th Cir. 1989).

[250] Ross v. University of Minn., 439 N.W.2d 28 (Minn. Ct. App. 1989).

[251] Eiland v. Wolf, 764 S.W.2d 827 (Tex. Ct. App. 1989).

[252] Akins v. Board of Governors, 867 F.2d 972 (7th Cir. 1988); *see also* The Yearbook of Education Law 1989 at 236, Akins v. Board of Governors of State Colleges and Univs., 840 F.2d 1371 (7th Cir. 1988).

A black law student appealed, *pro se,* his civil rights action against the law school and a professor, alleging racial discrimination in his dismissal.[253] Permitting his *pro se* complaint to be amended, the appellate court remanded the case with the instruction that the defendant might state a claim for relief under title VI.[254] In a similar case, a black medical student, also *pro se,* alleged racial animus motivated his dismissal from medical school.[255] The court dismissed his title VII claim since the action did not involve employment, denied the college's motion for pretrial disposition, and granted the student's motion for appointment of counsel. A Copt Egyptian medical resident, terminated from a state university residency program, sued the university for injunctive relief and damages under the claim that her dismissal was without cause and based on her race.[256] Since within the process of her dismissal, the student willingly accepted mediation which included her resignation, the destruction of her termination letter, and the receipt of a certificate of residency training, the court dismissed the case. Applicants who failed the bar examination in Tennessee brought civil rights action against the law school and the Board of Law Examiners alleging a racial quota for passing applicants.[257] The law school was deemed by the appellate court to be immune from civil rights action and the Board of Law Examiners, performing judicial acts, were protected by judicial immunity.

Two civil rights cases were dismissed as time-barred. In Louisiana, a graduate student expelled from her program alleged various civil rights claims.[258] The student exceeded the state statute of limitations of one year for a civil rights action. Additionally, the court would not allow the plaintiff to claim that the university's action of dismissal was a continuing tort. In a second time-barred case, a doctoral candidate claimed discrimination in the administration of his doctoral qualifying examination.[259] The appellate court affirmed the lower court denial of the student's claim but reversed the sanctions imposed on him awarding attorney fees to the defendant since the student was acting *pro se*.

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[253] Radcliff v. Landau, 883 F.2d 1481 (9th Cir. 1989).

[254] Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988); 42 U.S.C. § 2000d-4a.

[255] Lewis v. Russe, 713 F. Supp. 1227 (N.D. Ill. 1989).

[256] Assaad-Faltas v. University of Ark. for Medical Sciences, 708 F. Supp. 1026 (E.D. Ark. 1989).

[257] Hampton v. Tennessee Bd. of Law Examiners, 770 S.W.2d 755 (Tenn. Ct. App. 1988).

[258] Davis v. Louisiana State Univ., 876 F.2d 412 (5th Cir. 1989).

[259] Maduakolam v. Columbia Univ., 866 F.2d 53 (2d Cir. 1989).

Sexual harassment was the claim of female medical residents in two different continuing cases. In the first case, a female medical resident, having received an unsatisfactory academic evaluation, alleged sex discrimination and violation of due process in a suit against the hospital and a number of doctors.[260] On appeal, the court determined that the student alleged sufficient facts to sustain a cause of action under human rights law and the judgment was modified.[261] A determination on the merits is pending. In the second case, a female medical resident appealed her claim of sexual harassment during her residency program.[262] The court of appeals reversed and remanded the case finding that the resident had made *prima facie* cases of hostile work environment and *quid pro quo* sexual harassment.

Other Constitutional Issues

In South Carolina, a black cadet at a military college alleged that his civil rights had been violated by the college officials and by a group of white cadets who allegedly entered his room dressed in sheets resembling Ku Klux Klan outfits.[263] The district court held that the college officials were entitled to immunity from a claim and that the punishment that they imposed on the cadets would have reasonably been expected to protect the constitutional rights of all other cadets at the school. The court dismissed a motion from the white cadets questioning jurisdiction; the court will exercise jurisdiction over tort claims of trespass, assault, and outrage alleged against the white cadets.

A public university police officer detained a university medical student found in a university storeroom located several blocks from the medical school. The student, who appeared to be living in the room, claimed to have permission to use the room for studying and was in possession of keys to the room. The student alleged false arrest and imprisonment and violations of his fourth and fourteenth amendments.[264] The appeals court found that the use of peremptory challenges by the defendant's counsel to strike black jurors was not a violation of equal protection, that attorney fees should have been awarded along with the award for damages, that the student's civil rights complaint was adequate, and that the police officer was not immune from suit when negligence results in personal injuries to another.

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[260] *See* The Yearbook of Education Law 1989 at 236, Samper v. University of Rochester Strong Memorial Hosp., 528 N.Y.S.2d 958 (Sup. Ct. 1987).

[261] Samper v. University of Rochester, 535 N.Y.S.2d 281 (App. Div. 1988).

[262] Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988); *see also* The Yearbook of Education Law 1987 at 268, Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986).

[263] Nesmith v. Grimsley, 702 F. Supp. 122 (D.S.C. 1988).

In New York, a former handicapped student requiring a wheelchair alleged that the public university overcharged him as the single occupant of a double dormitory room during his undergraduate and graduate years in violation of section 504.[265] The student's master's degree was withheld pending the payment of his outstanding bill for housing. The court granted a summary judgment for the university, holding the claims based on his undergraduate years were time-barred; the student additionally failed to state a claim for his year of graduate study because he never applied for different accommodations.[266] The appellate court affirmed the lower court decisions.

Having been party to the occupation of the president's office at a public university, a graduate student was found guilty in a trial court of misdemeanor disruptive activity on a university campus. The student appealed on the grounds of "necessity" defense.[267] The court affirmed the lower court's decision. The student could not prove that his occupation of the president's office was necessary to avoid imminent harm in South Africa due to apartheid, or that international law authorizes his actions because apartheid violates international law. Furthermore, the appeals court held that the lower court did not err in refusing to charge the jury on the legal definition of "willfulness."

LIABILITY

Personal Injury

Liability for personal injury covers a variety of liabilities. The lead case, while directly related to liability, involved the consumption of alcohol by minors. Eleven fraternities were convicted of furnishing beer to minors.[268] The city police used a scheme where a plainclothes female officer would enter the fraternity, observe what she thought were minors purchasing beer, and notify other officers outside to apprehend the individuals as they left the party. If the apprehended individuals were minors they were prosecuted for consumption and the fraternity was prosecuted for furnishing. The trial court found and it was affirmed on appeal that the entry by the officer was consensual and did not violate a fraternity's expectation of privacy.

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[264] Parker v. Downing, 547 So. 2d 1180 (Ala. Civ. App. 1988).
[265] Rehabilitation Act of 1973, as amended 29 U.S.C. § 794.
[266] Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989).
[267] Wilson v. State, 777 S.W.2d 823 (Tex. Ct. App. 1989).

Cases involving liability for products or materials were litigated. One case involved state scaffolding law. The owner and contractor who erected the scaffolding was liable for the injury received by a worker who fell through a skylight when safety devices protecting the skylight required under the law were not installed.[269] In a product liability suit in Illinois against an Indiana university, the court ruled that the Illinois court must recognize an Indiana immunity statute based on the concept of judicial comity.[270] In a suit involving strict liability for asbestos installed in university buildings, the court ruled that the institution filed suit after the expiration of the four year statute of limitations.[271]

A number of cases involved suits arising out of professional treatment. A plaintiff failed in a suit to prove the infliction of emotional distress in the unsolicited showing of a pornographic video. The defendants showed through expert testimony that the plaintiff was emotionally disturbed before that incident.[272] In Illinois, a student failed to show that the university had a duty of care equal to what he alleged.[273] The plaintiff volunteered and was injured in a lab experiment requiring him to run one mile. The court refused to adopt the duty of care standard: a physical exam should have been taken before the run; blood pressure, pulse monitoring, and supervision during the run; and the availability of oxygen and water after the run equal reasonable care in these types of experiments.

The university was not held liable for failing to meet a duty of reasonable care when a window a student attempted to close fell, injuring the student.[274] In New York, a court found that the institution had taken reasonable care during a touch football game held as part of orientation when a freshman injured his knee.[275] An Illinois university was not held liable for the abduction and rape of a female who used a university parking lot when bringing her child to a privately owned day care center adjacent to the parking lot.[276] An AIDS patient alleged that the clinic and doctors breached the patient-client privilege when they allowed news media in the waiting room.[277] The court affirmed a lower court finding of no breach.[278]

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[268] Commonwealth v. Tau Kappa Epsilon, 560 A.2d 786 (Pa. Super. Ct. 1989).

[269] Wieszchowski v. Skidmore College, 537 N.Y.S.2d 911 (App. Div. 1989).

[270] Schoeberlein v. Purdue Univ., 544 N.E.2d 283 (Ill. 1989).

[271] Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989).

[272] Young v. St. Louis Univ., 773 S.W.2d 143 (Mo. Ct. App. 1989).

[273] Turner v. Rush Medical College, 537 N.E.2d 890 (Ill. App. Ct. 1989).

A professor was found guilty of "tort battery" when he came up behind a woman student in her home without intent to injure and moved his fingers on her shoulders in a motion simulating fingers striking the keyboard of a piano.[279] Finally, a court found that an Oklahoma woman was entitled to the uninsured motorist provisions of her husband's insurance policy when she was injured riding in an under-insured university owned vehicle.[280]

Workers' Compensation

Compensation cases involve questions of the location of the injury, work as the proximate cause of the injury, and retaliation resulting from the filing of a workers' compensation claim. Retaliation was at issue in a case where the university failed to make the appropriate accommodations in plaintiff's job, imposed excessive physical exertion on the plaintiff as part of her duties, and eventually dismissed her.[281] The court found that the plaintiff's contract was not renewed and no violation of law occurred in that action. In another case where the unemployment insurance agency failed to adequately monitor the treatment of an employee, its retroactive cessation of medical benefits was limited to thirty days prior to the notice.[282]

A university employee was eligible for compensation for an injury incurred while on a paid mid-morning break at a location on campus but away from the actual workplace.[283] Unemployment compensation was awarded to a worker whose unit was performing a task as part of a unit charitable donation to the college's foundation.[284]

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[274] Siegel v. Hosftra Univ., 545 N.Y.S.2d 935 (App. Div. 1989).

[275] Drew v. State, 536 N.Y.S.2d 252 (App. Div. 1989).

[276] Figueroa v. Evangelical Covenant Church, 698 F. Supp. 1408 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1427 (7th Cir. 1989).

[277] Anderson v. Strong Memorial Hosp., 542 N.Y.S.2d 96 (App. Div. 1989).

[278] *See* The Yearbook of School Law 1989 at 241, Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735 (Sup. Ct. 1988).

[279] White v. University of Idaho, 768 P.2d 827 (Idaho Ct. App. 1989).

[280] State Farm Auto. Ins. Co. v. Greer, 777 P.2d 941 (Okla. 1989).

[281] Krasney v. Curators of Univ. of Mo., 765 S.W.2d 646 (Mo. Ct. App. 1989).

[282] University of Ariz. v. Industrial Comm'n, 770 P.2d 1177 (Ariz. Ct. App. 1988).

Several cases involve workplace stress resulting in injury. In Oklahoma, a court found that a man who claimed his heart attack was induced by workplace stress was found eligible for workers' compensation.[285] A Colorado court found that a woman who sought treatment for workplace stress-induced emotional problems was awarded the appropriate medical benefits.[286] The selection of a physician willing to treat the patient was also at issue in this case.

Several plaintiffs, however, were not successful in their claims. For example, a plaintiff's illness in one case was found to be the result of excessive alcohol consumption and not work-related.[287] In Virginia, the court found that the institution was not liable for the employee's educational program since it went beyond the provisions of necessary vocational rehabilitation training services required under the law.[288]

Contract

Contract litigation included issues such as questions about the existence of a contract, breach of contract, bidding procedures, and jurisdiction ending with the expiration of the statute of limitations to file a claim. In Mississippi, a court ruled that a contract did not exist when an administrator at a public institution without authority entered into a contract with a bank.[289] The locus of contracting authority at public institutions is public information accessible to the vendor.

The Supreme Court ruled that a fraud and breach of contract claim could proceed in state court over the provisions of the Federal Arbitration Act in a contract containing stipulations which provide that the contract would be controlled by the laws of "the place where the project is located."[290] In New York, a breach of warranty or fraud claim involving asbestos in an institution's building is pending resolution.[291]

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[283] Lemming v. University of Cincinnati, 534 N.E.2d 1226 (Ohio Ct. App. 1987).

[284] Kim v. Mt. Hood Community College, 769 P.2d 239 (Or. Ct. App. 1989).

[285] Decker v. Oklahoma State Univ., 766 P.2d 1371 (Okla. 1988).

[286] Ruybal v. University of Colo. Health Sciences Center, 768 P.2d 1259 (Colo. Ct. App. 1988).

[287] Bird v. Southeast Mo. State Univ., 761 S.W.2d 746 (Mo. Ct. App. 1988).

[288] Yeargain v. Daniel Int'l, 384 S.E.2d 114 (Va. Ct. App. 1989).

[289] Board of Trustees of State Inst. of Higher Learning v. Peoples Bank of Miss., 538 So. 2d 361 (Miss. 1989).

[290] Volt Information Sciences, Inc. v. Board of Trustees, 109 S. Ct. 1248 (1989).

In a case involving faulty construction, the court ruled that the four year statute of limitations had tolled prohibiting the university from litigating this case.[292] The university either knew in 1982 or should have known that the faulty design and construction of the floor of a pharmacy building was the cause of cracking of the exterior walls. Another complaint by the same institution against the architects reached a similar result.[293] Finally, a contractor brought action, barred by sovereign immunity, that acts and omissions of the state caused its untimely completion of a construction contract.[294]

In Virginia, the court denied preliminary motions on a breach of contract claim awaiting a decision on the merits.[295] The Virginia couple is attempting to get possession of a cryo-preserved human prezygote held by a Virginia clinic and have it moved for implantation in a clinic near their new home in California. In another breach of contract case, a student sued alleging that the institution was obligated to award him a degree.[296] The student had failed to meet the degree requirements when he failed to take an exam as part of a required course. Furthermore, the institution had not treated him unfairly by failing to transfer credits from another institution.

An Alabama court ruled that the Board of Adjustments had sole jurisdiction over contract disputes with a public university.[297] In Florida, the court ruled that a university was entitled to attorney fees accrued both during litigation and arbitration of the contract dispute with a building contractor.[298] A subcontractor was successful in obtaining the costs for the repair of window wall panels which were damaged in a university building due to faulty construction.[299]

In a divorce settlement, a wife's teaching certificate awarded at about the time of the marriage was not part of the settlement but the master's degree in teaching acquired during the marriage became marital property and a part of the divorce settlement.[300]

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[291] Brooklyn Law School v. Raybon, Inc., 540 N.Y.S.2d 404 (Sup. Ct. 1989).

[292] Board of Regents v. Lueder Constr. Co., 433 N.W.2d 485 (Neb. 1988).

[293] Board of Regents v. Wilscam Mullins Birge, Inc., 433 N.W.2d 478 (Neb. 1988).

[294] Bolton Corp. v. State, 383 S.E.2d 671 (N.C. Ct. App. 1989).

[295] York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

[296] Bindrim v. University of Mont., 766 P.2d 861 (Mont. 1988).

[297] Alabama State Univ. v. State Bd. of Adjustment, 541 So. 2d 567 (Ala. Civ. App. 1989).

[298] B&H Constr. & Supply Co. v. District Bd. of Trustees, 542 So. 2d 382 (Fla. Dist. Ct. App. 1989).

[299] Northeastern Plate Glass Corp. v. Murray Walter, Inc., 537 N.Y.S.2d 657 (App. Div. 1989).

A number of contract cases involved the award of bids and bidding procedures. One case involved a private television broadcast corporation's contract to provide for the telecast of a school's athletic events. The court, ruling that the broadcast of athletic events was not a public function, found that the bids submitted by private television companies to become part of the network were not subject to the Freedom of Information Act.[301] In Washington, a court found that a university must provide competitive bidding procedures in its effort to purchase coal for the institution.[302] The court declared the provision requiring only the consumption of coal produced in the state to be unconstitutional. In California, the court vacated a contract because the bidder awarded the contract failed to conform to the bidding specifications.[303]

Deceptive Practices

In one case, a student alleged that a professor intercepted a student's evaluation of his teaching performance in which some candid and critical comments were made. He claimed that subsequent action by the professor served to breach the contract the student had with the institution, and was retaliation through the assignment of grades. He also alleged that the Federal Educational Rights and Privacy Act[304] was violated when the professor was given access to the student's records. The court found that the review of a student's records by a professor was not an invasion of privacy under the law, nor had other rights been violated. However, the trial court's sanction of the plaintiff for outrageous comments made in court was set aside. In another case, a student was successful in sustaining a charge that a proprietary school had used false information to induce her to enroll in a training program.[305]

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[300] McGowan v. McGowan, 535 N.Y.S.2d 990 (App. Div. 1988).

[301] KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382 (Iowa 1989).

[302] Lynden Transport, Inc. v. State, 768 P.2d 475 (Wash. 1989).

[303] Konica Business Mach. U.S.A. v. Regents of Univ. of Cal., 253 Cal. Rptr. 591 (Ct. App. 1988).

[304] 20 U.S.C. § 1232g (1986).

[305] Delta School of Commerce, Inc. v. Wood, 766 S.W.2d 424 (Ark. 1989).

Negligence

Cases involving charges of negligence which was the proximate cause of injury or death were before the courts. A university charged that a bank was negligent in the authorization of the payment of large checks made out to the university's account when the checks were manually signed instead of the usual machine signed method.[306] The court denied motions finding that triable issues were yet to be resolved.

A number of cases involved charges of negligence on the part of the university which were alleged to have caused injury. A Montana court found that a university was not negligent in the supervision of a minor high school student who was injured on a motorcycle after consuming alcohol at a party on campus.[307] A prisoner, on furlough to the college campus, was found guilty of contributory negligence when he was injured using a masonry saw while the instructor was not in the shop.[308] A student failed to surmount a public institution's sovereign immunity in a claim of negligence when she slipped on ice in a parking lot.[309] A bicyclist who was injured when he ran into the cross beam of the bleachers when he left the bike path failed to show that the accident was foreseeable, requiring the institution to post warning signs.[310]

Several cases surround the death of an individual. In a case involving a Grenada medical school road race, the court refused to grant a summary judgment.[311] Later the court, on the merits, ruled that the institution had taken reasonable steps to provide medical attention and other precautions for race participants.[312] The deceased student, who knew of his poor health, assumed complete risk when he voluntarily entered the road race that resulted in his death. A state supreme court ruled that a university owned indoor swimming pool did not come under the recreation land use exemption from liability.[313] The case involved the death of a scuba diver in the university's indoor pool. Finally, a Michigan court found that the institution could be found negligent under defective public buildings exceptions to immunity.[314] The institution failed to have a proper type of cell for intoxicated arrestees. The intoxicated individual hung himself with a belt from a vent in the cell.

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[306] Fordham Univ. v. Manufacturers Hanover Trust, 534 N.Y.S.2d 993 (App. Div. 1988).

[307] Graham v. Montana State Univ., 767 P.2d 301 (Mont. 1988).

[308] Clements v. Moncrief, 549 So. 2d 479 (Ala. 1989).

[309] Abrams v. Schoolcraft Community College, 444 N.W.2d 533 (Mich. Ct. App. 1989).

[310] Poerio v. State, 534 N.Y.S.2d 459 (App. Div. 1988).

[311] Gehling v. St. George Univ. School of Medicine, 698 F. Supp. 419 (E.D.N.Y. 1988).

[312] Gehling v. St. George's Univ. School of Medicine, 705 F. Supp. 761 (E.D.N.Y. 1989).

[313] Cassio v. Creighton Univ., 446 N.W.2d 704 (Neb. 1989).

A state supreme court ruled that a female who was raped by an intoxicated nonstudent in a women's restroom, raised significant issues about the university's responsibility in serving nonstudents at a university facility that dispenses alcoholic beverages.[315]

Finally, in a related case, an AIDS patient, filing a negligence claim, sought the identification of a blood donor whose infected blood resulted in his illness.[316] The court denied the motion since this action was not brought against the donor.

Medical Malpractice

In Tennessee, a university was not held liable when doctors employed by the university, but performing surgery as private physicians at a city hospital, were sued for malpractice.[317] In another case, a doctor's action of contacting a patient after several years when the patient failed to come back as instructed was not defined as falling under the continuous treatment doctrine.[318]

In Kentucky, a court ruled that physicians practicing at the university hospital had no protection from medical malpractice emanating from the state's sovereign immunity statutes.[319] Similarly, a Michigan court denied that a university hospital had governmental immunity.[320] A New York court found a private college's dental clinic would not be immune from charges of negligence.[321] In Texas, a federal court found that a physician employed by a state university was not entitled to quasi-judicial immunity.[322]

Finally, an attorney was disqualified from representing the patient against the university in one case and the university in another malpractice case.[323]

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[314] Hickey v. Zezulka, 443 N.W.2d 180 (Mich. Ct. App. 1989).

[315] Humiston v. Grose, 534 N.Y.S.2d 604 (App. Div. 1988).

[316] Doe v. University of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988).

[317] Parker v. Vanderbilt Univ., 767 S.W.2d 412 (Tenn. Ct. App. 1988).

[318] Rizk v. Cohen, 538 N.Y.S.2d 229 (1989).

[319] Gould v. O'Bannon, 770 S.W.2d 220 (Ky. 1989).

[320] Stein v. Southeastern Mich. Family Planning Project, 438 N.W.2d 76 (Mich. 1989).

[321] DeVito v. New York Univ. College of Dentistry, 544 N.Y.S.2d 109 (Sup. Ct. 1989).

[322] Gleason v. Beesinger, 708 F. Supp. 157 (S.D. Tex. 1989).

Antitrust

An Illinois case is pending since a motion to dismiss was denied.[324] At issue is whether the sale of academic supplies to nonprofit private corporations (educational institutions) violated the price discrimination provisions of the Robinson-Patman Act,[325] the monopolization provisions of the Sherman Act,[326] and the deceptive trade practices provisions of the Illinois Antitrust Act.[327] In another case, a law student brought restraint of trade and violation of first amendment rights in the action of a bar association to deny accreditation to a law school.[328] The court dismissed the complaint.

A university brought action to stop the sale of merchandise bearing the university's name, symbols, and insignia claiming it was a trademark infringement and an unfair and deceptive practice under the Sherman Act.[329] The court denied the university's motion for summary judgment, noting that the university had not abandoned its trade mark by allowing uncontrolled use in the past; issues of the origin of goods bearing the mark remained to be resolved.

Patents

A copyright case reported previously was back in court on appeal.[330] The University of Minnesota claimed a copyright violation in a computer software corporation's development of software to administer and score a psychological test. The Eighth Circuit Court affirmed the lower court decision regarding the university's standing and the original nature of the test questions justifying copyright.[331]

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[323] Crawford W. Long Memorial Hosp. v. Yerby, 373 S.E.2d 749 (Ga. 1988).

[324] American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 699 F. Supp. 152 (N.D. Ill. 1988).

[325] 15 U.S.C. § 13.

[326] 15 U.S.C. § 2.

[327] Ill. Rev. Stat., ch. 38 para. 60-3(3), ch. 1211/2 para. 262, 311 *et seq.* (1987).

[328] Zavaletta v. American Bar Ass'n, 721 F. Supp. 96 (E.D. Va. 1989).

[329] Board of Governors v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989).

[330] *See* The Yearbook of School Law 1989 at 247, Regents of Univ. of Minn. v. Applied Innovations, Inc., 685 F. Supp. 698 (D. Minn. 1987).

[331] Applied Innovations, Inc. v. Regents of Univ. of Minn., 876 F.2d 626 (8th Cir. 1989).

Estates and Wills

Several cases involve donations to the university. In one case, the donor sought to have the money returned because allegedly the university was not awarding the scholarship as prescribed in the endowment.[332] The court found that there was a lack of evidence that the university had not disbursed funds as prescribed and, furthermore, there was no record of a specific "promise" to use the gift in a certain way.

In another case involving the bequest of two sisters, the university attempted to hold the second sister's estate responsible for the failed bequest of the first sister.[333] The court found that no contract to execute mutual wills of the sisters existed.

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[332] Hawes v. Emory Univ., 374 S.E.2d 328 (Ga. Ct. App. 1988).

[333] *In re* Estate of Thwaites, 434 N.W.2d 214 (Mich. Ct. App. 1988).

TABLE OF CASES

Abbott v. Clairborne Parish School Bd., 25
Abraham v. Marist College, 226
Abrams v. Schoolcraft Community College, 243
Abramson v. Bennett, 90
Adams v. Alderson, 121
Adams v. Bell, 203
Adams v. Bennett, 203
Adams v. Califano, 203
Adams v. Richardson, 203
Adams v. School Dist. No. 5 of Jackson County Or., 13
Agins v. Darmstadter, 146
Ahmadieh v. State Bd. of Agriculture, 215, 216
Airline Constr. Co. v. Ascension School Bd. Parish, 150
Ake v. National Educ. Ass'n-South Bend, 41
Akins v. Board of Governors, 234
Alabama State Univ. v. State Bd. of Adjustment, 241
Alabama Student Party v. Student Gov't Ass'n, 231
Alaska Diversified Contractors v. Lower Kuskokwim School Dist., 149
Alexander v. County of Tazwell, 190
Alexander Local School Dist. Bd. of Educ. v. Alexander Local Educ. Ass'n, 29, 55
Alhambra School Dist. v. Superior Court, 130
Allen v. Board of Educ. of Indep. School Dist. No. 582, Jasper, Minn., 22
Allen v. Consolidated City of Jacksonville, 77
Allen v. Toms River Regional Bd. of Educ., 188
Altoona Area Vocational-Technical Educ. Ass'n v. Altoona Area Vocational-Technical School, 53
American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 245
American Fed'n of Gov't Employees, AFL-CIO v. Cavazos, 11
Andersen v. District of Columbia, 99, 112
Anderson v. Strong Memorial Hosp., 239
Andrews v. Ledbetter, 102
Anthony C., *In re,* 67
Appeal of Univ. Sys. of N.H., 221
Applied Innovations, Inc. v. Regents of Univ. of Minn., 245
Arizona Bd. of Regents v. State, 197
Aronsky v. Board of Educ., 20
Arvinger v. Mayor of Baltimore, 9
Arthur v. Nyquist, 92
Askew v. Ann Arbor Pub. Schools, 144
ASPCA v. Board of Trustees, 198, 199
Assaad-Faltas v. University of Ark. for Medical Sciences, 235
Association for the Defense of the Wash. Local School Dist. v. Kiger, 61, 184
Atascadero State Hosp. v. Scanlon, 114
Atkinson v. DeBraber, 126
Averback v. Board of Educ. of New Paltz Cent. School Dist., 31
Avila College v. Bunger, 228

B.G. v. Cranford Bd. of Educ., 108, 112
B.L. v. Department of Health and Rehabilitative Servs., 86
B & H Constr. & Supply Co. v. District Bd. of Trustees, 241
Bachmayer v. Toledo Bd. of Educ., 142
Bader v. State, 232
Baker v. Board of Regents, 223
Bally v. National Collegiate Athletic Ass'n, 159
Balley v. Northeastern Univ., 159
Barletta v. State, 232
Barnett v. Fairfax County School Bd., 98, 103, 106, 111, 118
Bates v. Board of Educ., 191
Bates v. Board of Regents, 218
Battrell, *In re,* 229
Bauer v. Board of Educ., Unified School Dist. No. 452, 26
Bauer v. Minidoka School Dist. No. 331, 131, 162
Bear Lake Educ. Ass'n v. Board of Trustees of Bear Lake School Dist. No. 33, 48
Beck v. Paideia School, Inc., 132
Bedford County Bd. of Educ. v. Harris, 29
Beechwood v. Board of Educ. of School Dist., No. 11, 22
Beine v. Board of Educ. of Cabell County, 22
Belanger v. Warren Consol. School Dist. Bd. of Educ., 26
Benitez v. New York City Bd. of Educ., 163
Benoit v. Emory Univ., 216
Berry v. Pike County Bd. of Educ., 34
Bertetto v. Sparta Community Unit Dist. No. 140, 135

Bertolucci v. San Carlos Elementary School Dist., 104
Best v. Houtz, 126
Bethel Park Citizens for Better Educ. Less Taxes v. Commonwealth, 191
Better Alternatives for Neighborhoods v. Heyman, 200
Bevli v. Brisco, 215
Bey v. Dollar Savings Bank, 228
Bicanic v. McDermott, 11
Bil Jim Constr. Co. Inc. v. Manchester Township Bd. of Educ., 150
Bindrim v. University of Mont., 241
Bird v. Southeast Mo. State Univ., 240
Blake v. Commission of Professional Competence, 23
Blau v. State Bd. of Educ., 63
Bloomsburg Univ. of Pa. v. Association of Pa. State College and Univ. Faculties, 211
Blount v. Department of Educ. & Cultural Servs., 65
Board of Educ. v. Anderson, 160
Board of Educ. v. Celotex Corp., 151
Board of Educ. v. Connecticut State Employees Retirement Comm'n, 187
Board of Educ. v. Illinois Educ. Labor Relations Bd., 56
Board of Educ. v. Logan Aluminum, Inc., 185
Board of Educ. v. Mayor of Deptford, 188
Board of Educ. v. Sergeant, 151
Board of Educ. of Chicago v. Industrial Comm'n, 145
Board of Educ. City School Dist. v. State Pub. Employment Relations Bd., 47
Board of Educ. of County of Lewis v. West Virginia Human Rights Comm., 117
Board of Educ. of Enlarged City School Dist. of City of Newburgh v. Newburgh Teachers' Ass'n, 49
Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 96, 104
Board of Educ. Jacksonville School Dist. No. 117 v. Illinois Educ. Labor Relations Bd., 53
Board of Educ. of Lockport Township High School Dist. 205 v. Gill, 180
Board of Educ. of Patchogue-Medford Union Free School Dist. v. Patchogue-Medford Congress of Teachers, 29
Board of Educ. of Town of Somers v. Freedom of Information Comm'n, 11
Board of Educ. of Warren Township High School Dist. 121 v. Warren Township High School Fed'n of Teachers, Local 504, 50
Board of Governors v. Helpingstine, 172, 245
Board of Regents v. Lueder Constr. Co., 241
Board of Regents v. Wilscam Mullins Birge, Inc., 241
Board of Regents v. The Atlanta Journal, 198
Board of Regents v. Wisconsin Personnel Comm'n, 210
Board of School Trustees of Gary Community School Corp. v. Indiana Educ. Employment Relations Bd., 46
Board of Trustees of Prairie State Comm'n College v. Prairie State College Fed'n of Teachers Local 3816, 222
Board of Trustees of State Inst. of Higher Learning v. Peoples Bank of Miss., 240
Board of Trustees v. Fox, 231
Bolecek v. State, 7
Bolton Corp. v. State, 241
Bonica v. Dade County School Bd., 136
Bonner v. City of N.Y., 133
Borger v. Pleasant Valley School Dist., 186
Borne v. Northwest Allen County School Corp., 125
Bougher v. University of Pittsburgh, 207
Bowers v. Board of Regents, 199
Bowers v. Du Page County Regional Bd. of School Trustees Dist. No. 4, 125
Bowery Sav. Bank v. Board of Assessors, 190
Bowles v. Los Lunas Schools, 145
Bowman v. Parma Bd. of Educ., 20
Branam v. Provo School Dist., 135
Branch v. Greene County Bd. of Educ., 22
Brentwood Union Free School Dist. v. State, 179
Briggs v. Board of Educ. of Conn., 106
Brock v. Rockridge Community Unit Dist. 300, 132
Brooklyn Law School v. Raybon, Inc., 241
Brooks v. East Chambers Consol. Indep. School Dist., 72
Brooks v. Orleans Parish School Bd., 21
Brown v. Hartshorne Pub. School Dist. No. 1, 6
Brown v. Johnson, 85, 153
Brown v. Landry, 149
Brown v. Weinberger, 203
Buckvar v. Syosset Cent. School Dist., 125, 162
Burke v. Austin Indep. School Dist., 153
Burkhardt v. City of Enid, 196

Burlington School Comm. v. Department of Educ., 110
Burr v. Ambach, 115
Burr v. Sobel, 115
Burreson v. Boulder Valley School Dist., 24
Burrow v. Ohio High School Athletic Ass'n, 159
Butler v. Board of Educ., Unified School Dist. No. 440, 27
Byrd v. Bossier Parish School Bd., 164

Cahill v. Norstar Bank of Upstate N.Y., 228
Calia v. Board of Educ., 139
California Agarian Action Project, Inc. v. Regents of Cal., 196
California Bldg. Indust. Ass'n v. Governing Board, 185
Canon-McMillan School Dist. v. Bioni, 134
Cantres v. Board of Educ. of City of N.Y., 18
Capuzzi v. Heller, 134
Cardinal Mooney High School v. Michigan High School Athletic Ass'n, 157
Cardwell v. Higher Educ. Assistance Found., 228
Carnahan v. McWalters, 33
Caro v. Aponte-Roque, 10
Carrington v. Commissioner of Educ., 112
Carter v. Baldwin County Bd. of Educ., 15
Cassidy v. Board of Educ., 139
Cassio v. Creighton Univ., 243
Castaneda v. Pickard, 87
Castagna & Sons, Inc. v. Board of Educ. of N.Y., 140
Cawthon v. Waco Fire & Casualty Ins. Co., 143
Cerniglia v. Ambach, 179
Cervisi v. Unemployment Ins. Appeals Bd., 221
Charleston County School Dist. v. Charleston County, 182
Chevlin v. Los Angeles Community College Dist., 233
Chicago Principals Ass'n v. Educational Labor Relations Bd., 42
Chicago Teachers Union, Local No. 1 v. Hudson, 39
Child v. Spillane, 122
Children Residing at St. Aloysius Home, *In re,* 116
Childress v. Madison County, 165
Chinea v. Benitez, 212
Chipps v. United States Dist. Court for the M.D. of Pa., 229
Chonich v. Wayne County Community College, 219
Christopher W. v. Portsmouth School Comm., 100
City of Ames, Iowa v. Heritage Communications, Inc., 196
City of Newton v. Krasnigor, 141
City of Richmond v. J.A. Croson Co., 169
Clarksville-Montgomery Bd. of Educ. v. United States Gypsum Co., 148
Clay v. Arizona Interscholastic Ass'n, Inc., 158
Clayton v. Place, 74
Cleburne County Bd. of Educ., *Ex parte,* 143
Clements v. Moncrief, 243
Cleveland Bd. of Educ. v. Loudermill, 12, 13
Clinton v. Board of Educ. of Howard County, 62, 184
Clonlara, Inc. v. Runkel, 63
Cogan v. Kal Leasing, Inc., 130
Cohen v. Board of Trustees of Univ. of Medicine and Dentistry of N.J., 211
Coleman v. Higher Educ. Assistance Found., 228
Coles v. Glenburn Pub. School Dist. No. 26, 23, 166
Collins v. Martinez, 214
Coliseum Hotel Ass'n v. Uniondale Union Free School Dist. No. 2, 190
Coliseum Towers v. Livingston Ass'n, 190
Columbia County School Dist. No. 13 v. Thurston, 146
Commercial Union Ins. Co. v. La Villa Indep. School Dist., 139
Commonwealth v. Brown, 120
Commonwealth v. Chalfant, 120
Commonwealth v. Mitchell, 201
Commonwealth v. Tau Kappa Epsilon, 238
Commonwealth v. Tinsley, 121
Commonwealth v. Willis, 140
Condell Hosp. v. Illinois Health Facilities Planning Bd., 202
Connecticut Educ. Ass'n, Inc. v. Tirozzi, 14
Continental Casualty Co. v. Anne Arundel Community College, 207
Continental Training Servs., Inc. v. Cavazos, 225
Cooks v. Normandy School Dist., 140
Copp v. Unified School Dist. No. 501, 8
Cornell Univ. v. City of N.Y. Police Dep't, 199
Corporation of Mercer Univ. v. National Gypsum Co., 238
Corporate Property Investors v. Uniondale Union Free School Dist. No. 2, 189
Correll v. Union Nat'l Bank of Pittsburgh, 228

Costello v. School Comm. of Chelsea, 21
Cotter v. District Bd. of Trustees, 215
Cotter v. School Dist. of Philadelphia, 134
County Collector of McHenry County, *In re,* 187
Cousins v. Dennis, 136
Covington v. Beaumont Indep. School Dist., 4, 169
Cox v. Jenkins, 100
Craddock v. State Bd. for Community Colleges and Occupational Educ., 215
Craft v. Virginia Employment Comm'n, 22
Crawford W. Long Memorial Hosp. v. Yerby, 245
Crews v. McQueen, 85, 136
Crocker v. Tennessee Secondary School Athletic Ass'n, 100, 158
Cromley v. Board of Educ. of Lockport Township High School Dist. 205, 8
Cronin v. Tower of Tewksbury, 69
Crump v. Board of Educ. of Hickory Admin. School Unit, 16
Cumero v. Public Employment Relations Bd., 32, 41
Cunico v. Pueblo School Dist. No. 60, 143
Cunningham v. Lutjeharms, 69, 175
Czapliki v. Gooding Joint School Dist. No. 231, 135

D.B., *In re,* 65
Dahlman v. Oakland Univ., 219
Dailey v. Royal Ins. Co., 145
Dalton v. Mercer County Bd. of Educ., 6
Daniel R.R. v. State Bd. of Educ., 105
Daniels v. Shasta-Tehama-Trinity Joint Community College Dist., 215
Danner v. Division of Family Servs., 226
Dartmouth Review v. Dartmouth College, 232
David Wolcott Kendall Memorial School v. NLRB, 221
Davis v. Frank, 121
Davis v. Louisiana State Univ., 235
Davis v. Mann, 234
Dearborn Fed'n of Teachers Local 681 v. Dearborn Bd. of Educ., 35
Decatur Bd. of Educ. Dist. No. 61 v. Illinois Educ. Labor Relations Bd., 46
DeCecco v. Board of Regents, 224
Decker v. Oklahoma State Univ., 240
Dellmuth v. Muth, 96, 114
Delta School of Commerce, Inc. v. Wood, 242
Denny v. Westfield State College, 207
Department of Defense v. Federal Labor Relations Auth., 57
Department of Educ. of Cal. v. Bennett, 183
Department of Educ., Diocese of Rockville Centre v. Lay Faculty Ass'n Local 1261, 48
De Paul Univ., Inc. v. Rosewell, 171, 200
DeSisto College, Inc. v. Town of Howey-in-the-Hills, 199
Destache v. Independent School Dist. No. 832, 27
DeVito v. New York Univ. College of Dentistry, 244
Devries v. Fairfax County School Bd., 106
De Wiest v. Tarleton State Univ., 211
Dickey v. Adams County School Dist. No. 50, 14
Dillion v. University Hosp., 201
DiMino v. Borough of Pottstown, 137
Dionisio v. Board of Educ. Mahopac Cent. School Dist., 28
Doe v. Independent School Dist. No. I-89, 140
Doe v. Sanders, 60, 122
Doe v. Smith, 101, 111
Doe v. University of Cincinnati, 244
Doherty v. Southern College of Optometry, 208
Dokmo v. Independent School Dist. No. 11, 29
Dornon, *In re,* 229
Dowell v. Board of Educ. Oklahoma City Pub. Schools, 91
Dowell v. Oklahoma City Pub. Schools, 91
Downs v. Henry County Bd. of Educ., 14
Drew v. State, 162, 239
Drew P. v. Clarke County School Dist., 107, 111, 112
Duane M. v. Orleans Parish School Bd., 113
Duncan v. Board of Educ. of United Township High School Dist. No. 30, 26
Duruttya v. Board of Educ. of County of Mingo, 15
Dyersburg Bd. of Educ. v. Dyer County Comm'n, 182

E.C. Goldman Inc. v. A/R/C Assocs. Inc., 151
EEOC v. Atlantic Community School Dist., 6
EEOC v. Board of Governors of State Colleges and Univ., 208
EEOC v. University of Detroit, 214
EEOC v. University of Pa., 212
Easley v. University of Mich. Bd. of Regents, 233

East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 57
Edgar v. School Bd. of Calhoun County, 17
Edgcomb v. Industrial Comm'n, 144
Edgewood Indep. School Dist. v. Kirby, 177, 178
Edmonds v. Bronner, 31
Education Resources Inst., Inc. v. Hammarstrom, 228
Educational Resources Inst., Inc. v. Selmonosky, 228
Edwards v. Rees, 71
Eiland v. Wolf, 234
Elkhart Community School Corp. v. Mills, 149
Elliott Elec. Supply Co. v. Adolfson & Peterson, Inc., 150
Elter v. Great Lakes Higher Educ. Corp., 227
English v. Hairston, 14
Epstein v. Board of Trustees, 231
Erdelt v. United States, 189
Erkkila v. Painesville Township Bd. of Educ., 30
Estate of Thwaites, *In re*, 246
Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, *In re*, 198
Ezell, *Ex parte*, 30

Faculty of City Univ. of N.Y. Law School at Queens College v. Murphy, 212
Farrell v. Boyer, 201
Faur v. Jewish Theological Seminary, 216
Felton v. Fayette School Dist., 80, 81
Fields v. Lyng, 120
Figueroa v. Aponte-Roque, 10
Figueroa v. Evangelical Convenant Church, 239
First Bank of Deer Park v. Deer Park Indep. School Dist., 186
First Nat'l Bank of Bellaire v. Huffman Indep. School Dist., 192
1st Street Books v. Marin Community College Dist., 197
Fish v. New York Mills Union Free School Dist., 139
Fisher v. Board of Educ. of W. Wash. County Community Unit Dist. No. 10, 34
Fisher v. Tacoma School Dist. No. 10, 5
Flax v. Potts, 93
Fleice v. Chualar Union Elementary School Dist., 34
Fleming v. New York Univ., 119, 237
Flemmer v. Tammany Elementary School Dist. No. 343, 28, 55
Florida State Univ. v. Florida Unemployment Appeals Comm'n, 220
Fogel v. Trustees of Iowa College, 218
Fong v. United States Dep't of Treasury, 119
Ford v. Caldwell Parish School Bd., 23
Ford v. Nicks, 206, 207
Fordham Univ. v. Manufacturers Hanover Trust, 243
Forsyth School v. Board of Registration, 197
Fort Bragg Ass'n of Educators NEA v. Federal Labor Relations Auth., 47
Fort Knox Dependent Schools v. Federal Labor Relations Auth., 47
Foster v. Craig Equip. Co., 148
Foster v. Ohio State Univ., 209
Fowler v. New York City Dep't of Sanitation, 119
Fox v. Board of Trustees, 230
Frank v. St. Landry Parish School Bd., 191
Franklin v. Board of Directors, School Dist. of Kan. City, 19
Franklin v. Harris, 18, 147
Freer Indep. School Dist. v. Manges, 193
Frey v. Adams County School Dist. No. 14, 36
Friedman v. Syosset Cent. School Dist., 138
Friends School v. Supervisor of Assessments, 189

Gant v. Waggy, 29
Garden City Center Assoc. v. Board of Assessors, 190
Gardner v. City of Biddeford, 140
Garnet Valley Serv. Personnel Ass'n v. Garnet Valley School Dist., 55
Garnett v. Renton School Dist. No. 403, 73
Gattyan v. Scarsdale Union Free School Dist. No. 1, 127
Gauvin v. Clark, 161
Gearhart v. Clearfield Bank & Trust Co., 228
Gehling v. St. George's Univ. School of Medicine, 162, 243
Gehman v. Prudential Property and Casualty Ins. Co., 115, 143
Geier v. Alexander, 204
Geier v. Blanton, 204
Geier v. Richardson, 204
Geier v. University of Tenn., 204
Geneva County Bd. of Educ. v. CNA Ins. Co., 142
Gerig v. Board of Educ. of the Cent. School Dist., R-III, 18
Giddings v. City of Detroit, 133

Gillette v. Fairland Bd. of Educ., 107, 111
Giosa v. School Dist. of Philadelphia, 138
Gleason v. Beesinger, 244
Global Frozen Food v. County of Nassau, 190
Gogate v. Ohio State Univ., 212
Gold v. University of Bridgeport School of Law, 233
Gonzalez v. North American College of La., Inc., 226
Gooden v. State, 127
Goss v. Lopez, 82, 83, 156
Gould v. O'Bannon, 244
Graham v. Montana State Univ., 243
Graham v. Security Savings and Loan, 226
Grand Rapids School Dist. v. Ball, 74
Gray v. University of Ark. at Fayetteville, 170, 218
Gray v. University of Kan. Medical Center, College of Health Sciences, School of Nursing, 201
Great Lakes Higher Educ. Corp. v. Cavazos, 224
Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 26, 53
Green v. County School Bd., 91
Green v. Los Angeles County Superintendent of Schools, 3
Greider v. Shawnee Mission Unified School Dist. No. 512, 136
Griggs v. Dolan, 185
Grisham v. Johnson, 230
Grubbs v. Aldine Indep. School Dist., 153
Guaranty Nat'l Ins. Co. v. Marshall County Bd. of Educ., 142
Guard Publishing Co. v. Lane County School Dist. No. 4J, 171
Gulf County School Bd. v. Washington, 36
Gump v. Chartiers-Houston School Dist., 164
Gutzwiller v. Fenik, 213
Guy J. v. Commissioner, N.H. Dep't of Educ., 101
Guy Gannett Publishing Co. v. University of Me., 171, 198
Gwirtz v. Ohio Educ. Ass'n, 40

Hackler v. Unified School Dist. No. 500, 129
Hagerty v. State Tenure Comm'n, 16
Hahnemann Univ. v. Commonwealth Dep't of Pub. Welfare, 202
Hall v. Tawney, 85
Halley v. Board of School Trustees of Blackford County School Corp., 29, 51
Halm v. Board of Educ. of the Dansville Agricultural Schools, 15
Hampton v. Tennessee Bd. of Law Examiners, 235
Hankins v. Dallas Indep. School Dist., 13
Hannah, *In re*, 22
Hannan v. Chesapeake Union Exempted Village School Dist. Bd. of Educ., 33
Harms v. Independent School Dist. No. 300, La Crescent, 27
Harrell v. University of Montevallo, 206
Harris v. Adams, 119, 120
Harris v. Board of Trustees of State Colleges, 214
Harris v. Pennsylvania Higher Educ. Assistance Agency, 228
Harrison v. Arlington Indep. School Dist., 30
Harrison v. Massachusetts Soc'ty of Professors/Faculty Staff Union, 222
Harrison v. Sobol, 60
Harrison County School Bd. v. Morreale, 14
Harvey v. Ouachita Parish School Bd., 163
Ha-Sadi v. South Country Cent. School Dist., 129
Hawes v. Emory Univ., 246
Hawkins v. McCain, 24
Hayes v. Unified School Dist. No. 377, 100, 110
Hayes v. Worker's Compensation Appeals Bd., 144
Hazelwood School Dist. v. Kuhlmeier, 77
Hebron Pub. School Dist. v. United States Gypsum, Co., 148
Heimberger v. School Dist. of Saginaw, 82
Helena Elementary School Dist. No. 1 v. State, 176, 177
Hendricks v. Gilhool, 98, 106, 117
Hendricks v. Southfield Pub. Schools, 137
Henry v. Earhart, 11
Heruth v. Independent School Dist. No. 11, 27
Hickey v. Zezulka, 244
Hightower v. State Comm'r of Educ., 23
Hill v. Gill, 37
Hillsborough County School Bd. v. Fliter, 144
Hodgeson v. Board of Educ. of Buena Vista School Dist., 28, 56
Holland v. Kennedy, 219
Hollenbeck v. Board of Educ. of Rochelle Township, 160

Holliman v. Holliman, 230
Honig v. Doe, 109
Horace Mann Ins. v. Analisa N.. 141
Hospital Ass'n of N.Y. State v. Axelrod, 32
Howlett v. Rose, 8, 152
Hudson v. Chicago Teachers Union, Local No. 1, 39, 40
Humiston v. Grose, 244
Hunnicutt v. Board of Regents of Univ. Sys. of Ga., 204
Hunt v. McNair, 196
Hyden v. Board of Educ. of Wilson County, 114

Independent School Dist. No. 318, *In re*, 27
Indiana Civil Rights Comm'n v. Culver Educ. Found., 3
Indiana Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n, 45
Ingraham v. Wright, 84
Interstate Fire & Casualty Co. v. Auto-Owners Ins. Co., 142
Irving Indep. School Dist. v. Tatro, 108
Isabelle v. Department of Employment and Training, 32
Islamic Center of Miss., Inc. v. City of Starkville, Miss., 200
Iversen Constr. Corp. v. Palmyra-Macedon Cent. School Dist., 151

Jackson v. Roberts, 134
Jacksonville Branch, NAACP v. Duval County School Bd., 91
Jacobs v. Meister, 210
Jager v. Douglas County School Dist., 76, 172
Jager v. Ramona Bd. of Educ., Ramona School Dist., 18
James v. Gloversville Enlarged School Dist., 128
James v. Nashua School Dist., 113
Jarrett v. Butts, 153
Jay School Corp. v. Cheeseman, 28
Jeffers v. Olexo, 132
Jefferson Consol. School Dist. v. Carden, 17
Jeffery v. O'Donnell, 65
Jenkins v. Missouri, 88
Jennings v. Joshua Indep. School Dist., 70
Jennings v. Tinley Park Community Consol. School Dist. No. 146, 5
Jericho Properties No. 1 v. Musiello, 190
Jericho Quandrangle One v. Musiello, 190
Jericho-Westbury Indoor Tennis v. Board of Assessors, 190
Jeter v. Board of Educ. of School Dist. of Fremont, County of Dodge, 34
Jett v. Dallas Indep. School Dist., 3, 4, 169, 170
Jibson v. Michigan Educ. Ass'n-NEA, 40
John R. v. Oakland Unified School Dist., 125
Johnson v. Board of Trustees, Beaverhead County High School Dist., 20
Johnson v. State, 53
Johnston v. School Comm. of Watertown, 48
Joiner, *In re*, 228
Jones v. Jenkins, 11
Jungina v. Stafford, 33

KMEG Television, Inc. v. Iowa State Bd. of Regents, 242
Kansas City, Mo. School Dist. v. Missouri, 88
Kawatra v. Medgar Evers College of the City of N.Y., 213
Keller v. School Dist. No. 5, 22
Keppler v. Hinsdale Township High School Dist., 5
Kethley v. Draughon Business College, Inc., 214
Kettle v. Sweet Home Cent. School Dist., 140
Kim v. Mt. Hood Community College, 240
Kirk v. Hesselroth, 13
Kirschner v. Carney-Nadeau Pub. Schools, 133
Klein v. State Bd. of Educ., 215
Knapp v. Commissioner, 219
Knight v. District of Columbia, 100, 112
Koenig v. Southeast Community College, 197
Kohl v. Woodhaven Learning Center, 118
Konica Business Mach. U.S.A. v. Regents of Univ. of Cal., 242
Kovats v. Rutgers, 210
Kramer v. Lagnese, 129
Krasney v. Curators of Univ. of Mo., 239
Krenzelak v. Canon-McMillan School Dist., 54
Krizek v. Board of Educ. of Cicero-Stickney Township High School Dist. No. 201, Cook County, Ill., 12
Kukor v. Grover, 177
Kyriakopoulos v. George Washington Univ., 216

LTV Educ. Sys., Inc. v. Bell, 226
Lamphere v. Brown Univ. in Providence, R.I. and Providence Plantations, 206
Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist., 111

Lassiter v. Covington, 217
Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of San Francisco, 200
Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations Bd., 42, 169
Lawson, *In re*, 228
Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 120
Lee v. Eufaula City Bd. of Educ., 88
Lee Academy Educ. Ass'n v. Academy, 43
Lehnert v. Ferris Faculty Ass'n, 40, 221
Lemming v. University of Cincinnati, 240
Lemon v. Kurtzman, 73, 172, 175
Leon County School Bd. v. Grimes, 145
Leonard v. McKenzie, 99, 107
Leu v. Newton Community School Dist., 25
Levie v. Orleans Parish School Bd., 132
Levy v. Northport-East Northport Union Free School Dist., 66
Lewandowski v. Two Rivers Pub. School Dist., 14
Lewis v. Board of Educ. of N. Clay Community Unit School Dist. No. 25, 31, 167
Lewis v. Russe, 235
Lewis v. Sobol, 66
Lewiston-Porter Cent. School Dist. v. Sobol, 30
Liddell v. Board of Educ. of St. Louis, Mo., 89, 181
Lile v. University of Iowa Hosp. and Clinics, 202
Lincoln Intermediate Unit No. 12 v. Commonwealth, 116
Lindemuth v. Jefferson County School Dist. R.-1, 146, 168
Lingleville Indep. School Dist. v. Valero Transmission Co., 185
Lipsett v. University of P.R., 236
Little Rock School Dist. v. Pulaski County Special School Dist., 89
Lock Haven Univ. of Pa. v. Commonwealth Unemployment Compensation Bd of Review, 221
Logan v. City of N.Y., 127
Logan County Educ. Ass'n v. Logan County Bd. of Educ., 187
Long v. School Dist. of Univ. City, 24
Lopez v. Brentwood Union Free School Dist., 140
Lorain Educ. Ass'n v. Lorain City School Dist. Bd. of Educ., 57
Louis M. v. Ambach, 100, 101
Louis v. Board of Educ. of City of N.Y., 4
Louisiana State Bd. of Elementary and Secondary Educ. v. United States Dep't of Educ., 115
Lourdes High School v. Sheffield Brick and Tile Co., 139
Lowary v. Lexington Local Bd. of Educ., 12
Lowe v. Commack Union Free School Dist., 7
Loyola Univ. Medical Center v. Med Care HMO, 202
Lucas v. Townsend, 191
Luethje v. Peavine School Dist. of Adair County, 9
Lynch v. Workman's Compensation Appeal Bd., 31
Lynden Transport, Inc. v. State, 242
Lyng v. Northwest Indian Cemetary Protective Ass'n, 68

Machen v. Scottsboro City Bd. of Educ., 30
Macomb County Intermediate School Dist. v. Joshua S., 108
Maduakolam v. Columbia Univ., 235
Malone v. Shelby County Bd. of Educ., 34
Mangaroo v. Nelson, 217
Manges v. Freer Indep. School Dist., 192
Maradiaga v. University of New Orleans, 220
Marin-Piazza v. Aponte-Roque, 10
Marriage of Hasley, *In re*, 230
Marsh v. Chambers, 73
Martin v. Guillot, 214
Martinez v. Cotulla Indep. School Dist., 9
Martinez v. School Bd. of Hillsborough County, Fla., 97, 107, 118
Mathis v. Berrien County School Dist., 86, 126
Matta v. Board of Educ., 141
Maynard v. Board of Trustees of Teachers' Pension and Annuity Fund, 23
McCarthy v. Fletcher, 80
McCauley v. Greensboro City Bd. of Educ., 3
McFadden v. Board of Educ. Nanuet Union Free School Dist., Rockland County, 20
McGowan v. McGowan, 35, 242
McKeesport Area School Dist. v. Cicogna, 27
McKinney v. Board of Trustees, 217
McLaren v. Emory Univ., 208
McNair v. Oak Hills Local School Dist., 109
McSombodies (No. 1) v. Burlingame Elementary School Dist., 113

McSombodies (No. 2) v. San Mateo City School Dist., 113
Mechanicsburg Area School Dist. v. Commonwealth, 31
Meckley v. Kanawha County Bd. of Educ., 18
Medlin v. Bass, 147
Meek v. Pittenger, 68, 175
Meer v. Bugliarello, 211
Metropolitan Dade County v. Miami-Dade County Community College Found., 200
Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ., 108, 109
Metzer v. Lyng, 227
Mergens v. Board of Educ. of Westside Community Schools, 74
Michelin v. Jenkins, 12
Michigan Dep't of Educ. v. United States Dep't of Educ., 182, 183
Michigan United Conservation Clubs v. Board of Trustees, 197
Middle Bucks Area Vocational-Technical School Educ. Ass'n v. Executive Council, 49
Midland Borough School Dist. v. Pennsylvania Labor Relations Bd., 46
Mifflin County School Dist. v. Lutz, 18
Millon v. Coughlin, 13
Milkovich v. News-Herald, 10
Milne v. Milne, 230
Mindemann v. Independent School Dist. No. 6 of Caddo County, 29, 48, 166
Mineola Union Free School Dist. Clerical/Secretarial Employees Ass'n v. Public Employment Relations Bd., 44
Mingo County Equal Opportunity Council v. State Human Rights Comm'n, 7
Minnesota Daily, The v. University of Minn., 198
Mitchell v. Los Angeles Community College Dist., 204
Mitten v. Muscogee County School Dist., 112, 113, 114
Montgomery, *In re*, 220
Monti v. Warwick School Comm., 33, 144
Moon Area School Dist. v. Garzony, 193
Moore v. Alabama State Univ., 205
Moore v. Central Educ. Agency, 32
Moore v. District of Columbia, 113
Moore v. Mississippi Valley State Univ., 217
Moore v. Taylor, 138
Morris v. Orleans Parish School Bd., 128
Morrison v. Brandeis Univ., 212
Morrison v. Chicago Bd. of Educ., 62
Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., 222
Mount Pleasant Indep. School Dist. v. Estate of Lindburg, 129
Mount Sinai School of Medicine v. American Tobacco Co., 199
Mr. D. v. Glochester School Comm., 113
Mrs. W. v. Tirozzi, 103
Muhammed v. Board of Supervisors, 218
Mullendore v. Nuernberger, 184
Murray v. Sonoma County Office of Educ., 28
Murray County Bd. of Educ. v. Wilbanks, 146, 148
Muth v. Central Bucks School Dist., 114
Myles v. Paragould School Dist., 144

N.J. Koss Inc. v. Regan, 225
NEA-Goodland v. Board of Educ., U.S.D. No. 352, Sherman County, 30, 51
NLRB v. Yeshiva Univ., 221
Naches Valley School Dist. No. JT3 v. Cruzen, 49
Naranjo v. Southwest Indep. School Dist., 137
National Gypsum v. Kirbyville Indep. School Dist., 147
National Labor Relations Bd. v. Potential School for Exceptional Children, Inc., 43
National Security Archive v. United States Dep't of Defense, 198
National Treasury Employees Union v. Von Raab, 72
Naylor v. Lee's Summit Reorganized School Dist. R-7, 88
Neiman v. Kingsborough Community College, 223
Nelson v. Moline School Dist. No. 40, 79
Nesmith v. Grimsley, 236
New Jersey v. T.L.O., 69, 70
New Life Baptist Church Academy v. Town of East Longmeadow, 67, 68
Newman v. Commonwealth of Mass., 216
North Carolina Press Ass'n, Inc. v. Spangler, 199
Northeastern Plate Glass Corp. v. Murray Walter, Inc., 241

Odegaard v. Everett School Dist. No. 2, 23
Ohemeng v. Delaware State College, 206
Ohio Student Loan Comm'n v. Cavazos, 225
Omlor v. Cleveland State Univ., 211
Oregon Ass'n of Classified Employees v. Salem-Keizer School Dist. 24J, 44

Organization of Ancillary Servs. of State Univ. College at Oneonta, N.Y., *In re*, 220
Orleans Parish School Bd v. McNamara, 188
Osborne v. Stone, 214
Ossining Union Free School Dist. v. Anderson, 150
Ottaviani v. State Univ. of N.Y. at New Paltz, 205
Overseas Educ. Ass'n v. Federal Labor Relations Auth., 45
Owens v. Okure, 201

Pagano v. Massapequa Pub. Schools, 152
Palmer v. Merluzzi, 82, 156
Parate v. Isibor, 210
Paredes v. Curtis, 83
Parker v. Dowling, 237
Parker v. Vanderbilt Univ., 244
Parker County v. Weatherford Indep. School Dist., 185
Patton v. Springfield Bd. of Educ., 37
Payne v. Blackwell, 139
Payne v. Department of Human Resources, 126
Peabody Constr. Co. v. City of Boston, 151
Penn Hills School Dist. v. Municipality of Penn Hills, 187
Pennsylvania Dep't of Transp. v. Tinsley, 37
Pennsylvania Human Relations Comm'n v. School Dist. of Philadelphia, 94
People v. Brom, 226
People v. Manzanillo, 116
Perez v. Aerospace Academy, Inc., 69
Petrella v. Siegel, 23
Phillips v. South Range Local School Dist. Bd. of Educ., 25
Phillips v. State Bd. of Regents of State Univ. and Community College Sys., 215
Pierce v. Society of Sisters, 63
Ping v. National Educ. Ass'n, 40
Pitts v. Bay County School Bd., 30, 188
Pitts v. Board of Educ. of U.S.D. 305, Salina, Kan., 14
Pitts v. Freeman, 90
Pittsburgh Bd. of Pub. Educ. v. Human Relations Comm'n, 3
Planned Parenthood of Southern Nev., Inc. v. Clark County School Dist., 78
Poerio v. State, 243
Poling v. Murphy, 78
Polk County School Bd. v. Cobbett, 144
Pounds v. Denison, 219
Powell v. Board of Educ. of City of Peoria, Dist. 150, 23
Presbyterian-Univ. of Pa. Medical Center v. Commonwealth, 202
Prescott v. Newsday, Inc., 128
Prichard Bros. Inc. v. Grady Co., 151
Property Owners v. Commonwealth, 191
Progressive Animal Welfare Soc'y v. University of Wash., 199
Public Employee Relations Bd. v. Washington Teachers' Union Local 6, 45
Pueblo School Dist. No. 60 v. Clementi, 140

Quarles v. Oxford Mun. Separate School Dist., 93

Radcliff v. Landau, 235
Rahlf v. Illinois State Scholarship Comm'n, 228
Ramos v. Waukegan Community Unit School Dist. No. 60, 136
Ramon v. Soto, 101
Rankin v. Independent School Dist. No. I-3, Noble County Okla., 16
Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 29, 51
Raven v. Oakland Unified School Dist., 14, 21, 52
Reasoner v. Meyer, 83
Reback v. Rhode Island Bd. of Regents for Elementary and Secondary Educ., 37
Reckson Assoc. v. Uniondale Union Free School Dist. No. 2, 190
Regents of Univ. of Minn. v. Applied Innovations, Inc., 245
Rendleman v. Bowen, 229
Rhode Island ACLU v. Bernasconi, 72
Rhode Island Student Loan Auth. v. Nels, Inc., 226
Richardson v. Rankin County School Dist., 137
Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 54
Risch v. North Dakota Workers Compensation Bureau, 32, 145
Ritzie v. City Univ. of N.Y., 205
Rivera v. East Otero School Dist. R-1, 79
Rizk v. Cohen, 244
Roberts v. Bennett, 229
Roberts v. College of the Desert, 217
Roberts v. Madigan, 75
Roberts v. Santa Cruz Valley Unified School Dist. No. 35, 19
Rochin v. California, 85, 153
Rockford Principals and Supervisors Ass'n v. Board of Educ. of Rockford School Dist. No. 205, 14
Rodgers v. Lehman, 121
Rogers v. Bennett, 122
Rogers v. Kelly, 12
Rollins v. Blair, 124, 165
Rome Gen. Contracting Co. v. Board of Educ. of N.Y., 151

Rosa R. v. Connelly, 81
Rose v. Council for Better Educ., 178, 179
Rosenberg v. Commonwealth Unemployment Compensation Bd. of Review, 221
Ross v. University of Minn., 234
Ross Univ. School of Medicine v. Cavazos, 225
Rothschild v. Grottenthaler, 118
Rovello v. Lewis County Bd. of Educ., 20
Roy v. Teachers Ins. and Annuity Ass'n, 220
Royal Business School, Inc. v. New York State Dep't of Educ., 225
Royster v. Cushman, 36
Rozek v. Topolnicki, 215
Rush-Henrietta Cent. School Dist. v. Newman, 47
Russell County School Bd. v. Anderson, 16
Rutledge v. Arizona Bd. of Regents, 161
Ruybal v. University of Colo. Health Sciences Center, 240

SCS Business & Technical Inst., Inc. v. Barrios-Paoli, 196
Saint Andrew's School v. Walker, 189
Salas v. State Personnel Bd., 219
Samper v. University of Rochester, 236
Samper v. University of Rochester Strong Memorial Hosp., 236
Sands v. Morongo Unified School Dist., 76
Saquebo v. Roque, 10
Sargent v. Board of Coop. Educ. Servs., 51
Sariski v. E.R. Squibb and Sons, Inc., 144
Savio, *In re*, 115
Schaerrer v. Westman Comm'n Co., 230
Schaill v. Tippecanoe County School Corp., 71
Schirripa v. Birch Lane Elementary School, 139
Schleckler v. Connetquot Cent. School Dist., 128
Schmidt v. Wisconsin Employee Trust Funds Bd., 32
Schneider v. Indian River Community College Found., 218
Schneider v. Sobol, 32, 179
Schoeberlein v. Purdue Univ., 238
Scholastic Book Clubs Inc. v. State Bd. of Equalization, 185
School Bd. of Campbell County v. Beasley, 104
School Bd. of City of Norfolk v. Giannoutsos, 24
School Bd. of Pinellas County v. Smith, 109
Scoggins v. Henry County Bd. of Educ., 84
Searcey v. Crim, 79
Searcey v. Harris, 79
Seemuller v. Fairfax County School Bd., 9
Seibert v. University of Okla. Health Sciences Center, 218
Selby v. North Calloway Bd. of Educ., 17
Sellers v. Lowndes County Bd. of Educ. 30
Serrapica v. City of N.Y. 121, 122
Shaffer v. School Bd. of Martin County, 34
Sharif v. New York State Educ. Dep't, 227
Sheldon v. Jasper Indep. School Dist. 192
Shelly C. v. Venus Indep. School Dist., 113
Sheridan Road Baptist Church v. Department of Educ., 64
Sherman v. Community Consol. School Dist. 21, 75
Sherpell v. Humnoke School Dist. No. 5 of Lonoke Cty., Ark., 4
Shinn v. Illinois Educ. Labor Relations Bd., 41
Shook v. Gaston County Bd. of Educ., 102, 103
Shryock v. Pittsburg State Univ., 228
Siegel v. Board of Educ. of City School Dist. of City of N.Y., 5
Siegel v. Hosftra Univ., 239
Simkins v. South Dakota High School Activities Ass'n, 158
Simmons, *In re*, 220
Simonis, *In re*, 228
Simpson v. Caddo Parish School Bd., 141
Singleton v. Jackson Mun. Separate School Dist., 91
Sisson v. Board of Regents, 218
Six v. Job Serv. N.D., 18, 169
Skinner v. Railway Labor Executives' Ass'n, 72
Smith v. Chicago Bd of Educ., 4
Smith v. Massachusetts Inst. of Technology, 208
Smith v. Robinson, 103
Smith v. Stoneking, 152
Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 17
Sosa v. Hiraoka, 204
South Carolina State Educ. Assistance Auth. v. Cavazos, 225
South Carolina Educ. Ass'n v. Campbell, 41
Southeastern Community College v. Davis, 120
Spacco v. Bridgewater School Dep't, 74, 174, 175

Spedding v. Bowman, 140
Sperling v. Board of Educ. of Poughkeepsie City School Dist., 19
Sperry v. Montana State Univ., 220
Spiegler v. District of Columbia, 102
Sports/Media Sales Co. v. Rasmussen, 167
Spring v. Sheboygan Area School Dist., 7
St. Clair Area School Dist. v. St. Clair Area Educ. Ass'n, 57
St. Landry Parish School Bd. v. Acadiana Tire Shop, Inc., 192
St. Paul Guardian Ins. Co. v. Canterbury School of Fla., 142
Staheli v. Smith, 213
Staheli v. University of Miss., 213
Startzel v. Commonwealth Dep't of Educ., 37
State (State Univ. of N.Y., Binghamton), *In re*, 222
State v. Bennett, 224
State v. Board of Educ. for Cleveland Heights-Univ. Heights City School Dist., 34
State v. Brewer, 65
State v. DeJonge, 64
State v. Milton-Union Exempted Village Bd. of Educ., 34
State v. Spooner, 23
State v. Spulock, 23
State v. Windham Exempted Village School Dist. Bd. of Educ., 31
State Dep't of Natural Resources v. Antioch Univ., 201
State *ex rel.* Bds. of Educ. v. Chafin, 180
State *ex rel.* Blackwell v. Wyoming County Bd. of Educ., 19
State *ex rel.* Clinton Area Vocational School v. Dandurand, 116
State *ex rel.* Eccleston v. Montana Third Judicial Dist. Ct., 138
State *ex rel.* Oser v. Haskins, 31
State *ex rel.* Page v. Reorganized School Dist. R-VI, 150
State *ex rel.* Univ. of Iowa Hosps. and Clinics v. Hunter, 202
State *ex rel.* Weaver v. Ayers, 182
State Farm Auto Ins. Co. v. Greer, 239
State Sys. of Higher Educ. v. Association of Pa. State College and Univ. Faculties, 222
Stein v. Southeastern Mich. Family Planning Project, 244
Stell v. Board of Pub. Educ., City of Savannah, 92
Stell v. Savannah-Chatham County Bd. of Educ., 92
Stellmaker v. DePetrillo, 10, 42
Stewart v. Acalanes Union High School Dist., 36
Stewart v. Commissioner of Internal Revenue, 190
Stewart v. Fort Wayne Community Schools, 26
Stoneking v. Bradford Area School Dist., 152
Strain v. Mitchell Mfr. Co., 149
Strain v. Rapid City School Bd. for Rapid City Area School Dist., 21
Student Gov't Ass'n v. Board of Trustees of Univ. of Mass., 231
Suber v. Bulloch County Bd. of Educ., 10
Sublette County School Dist. No. 1 v. State Bd. of Equalization, 189
Sullivan v. Board of Educ., 139
SUNY College of Envtl. Science and Forestry v. State Div. of Human Rights, 219
Susan M. v. New York Law School, 233
Sutco Const. v. Modesto High School Dist., 182
Swanson v. Sheppard, 228
Sylvania Educ. Ass'n v. Sylvania City Schools, 17
Szumigala v. Hicksville Union Free School Dist. Bd. of Educ., 25, 54

T.J. v. State, 72
Taborn v. Hammonds, 25
Tadros v. Coleman, 213
Tagatz v. Marquette Univ., 205
Tanner v. Golden, 36
Taylor v. School Bd. of Seminole County, 15
Taylor v. Tennessee Student Assistance Corp., 228
Teachers Ass'n of Japanese Educ. Inst. of N.Y., Inc. v. Japanese Educ. Inst. of N.Y., 50
Teamsters Local 525 v. Board of Trustees, 222
Templar v. Decatur Pub. School Dist. No. 61, 130
Teresa P. v. Berkeley Unified School Dist., 86
Terrebonne Parish School Bd. v. D & O Contractors, Inc., 151
Texas Employment Comm'n v. Southside Indep. School Dist., 31
Texas State Teachers Ass'n v. Garland Indep. School Dist., 39
Thomas v. Board of Educ. of McDowell County, 30
Thomas v. Board of Examiners, Chicago Pub. Schools. 13
Thomas v. Cascade Union High School Dist. No. 5, 21
Thomas v. Capital Security Serv., Inc., 71
Thompson v. Board of Educ. of City of Chicago, 9, 154

Thompson v. Board of Trustees of School Dist. No. 2, Yellowstone County, 22, 54
Thompson v. City of Los Angeles, 201
Thorin v. Bloomfield Hills School Dist., 30
Thorne v. Monroe City School Bd., 34
Thornhill v. Marsh, 120
Thornock v. Boise Indep. School Dist. No. 1, 106, 111
Timothy W. v. Rochester, N.H. School Dist., 97
Tin Man Roofing Co. v Birmingham Bd. of Educ., 151
Tinker v. Des Moines Indep. School Dist., 78
Tolson v. Sheridan School Dist., 12
Tomczik v. State Tenure Comm'n, 19
Toney v. Burris, 229
Toole v. Jones, 19
Tornow v. Board of Educ. of Indep. School Dist. No. 118, Remer, Minn., 23
Traverse City Educ. Ass'n v. Traverse City Pub. Schools, 43
Tucker v. Bay Shore Union Free School Dist., 112
Turley v. School Dist. of Kan. City, Mo., 85, 153
Turner v. Rush Medical College, 238
Tye v. Board of Educ. of Polaris Jt. Vocational School Dist., 28

Unified School Dist. No. 501 v. Continental Casualty Co., 142
Unified School Dist. No. 500 v. United States Gypsum Co., 148
United Pub. Employees, Local 790 v. Public Employment Relations Bd., 221
United States v. Barry, 229
United States v. Cooper, 229
United States v. Dillingham, 229
United States v. Duffy, 229
United States v. Hatcher, 229
United States v. Hunter, 229
United States v. Louisiana, 203
United States v. Lowndes County Bd. of Educ., 87
United States v. Martin, 229
United States v. Quinn, 229
United States v. State, 88, 91, 92
United States v. Woods, 230
University of Ariz. v. Industrial Comm'n, 239
University of Cincinnati v. Bowen, 201
University of Pa. v. EEOC, 212
Upper Marion Area School Dist. v. Upper Marion Area Educ. Ass'n, 54
Urbanski v. Independent School Dist. No. 280, 146

Valero Transmission Co. v. San Marcos Consol. Indep. School Dist., 192
Van Inwagen v. Sanstead, 67
Vardaman v. Florence City Bd. of Educ., 130
Varma v. Bloustein, 211
Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 223
Vislisel v. University of Iowa, 209
Volt Information Sciences, Inc. v. Board of Trustees, 240

Walko v. Kean College of N.J., 231
Walled Lake Consol. School Dist. v. Charter Township of Commerce, 191
Ware v. Unified School Dist. No. 492, Butler County, Kan., 8
Ware v. Valley Stream High School Dist., 77
Warren v. Drake Univ., 232
Washington v. Bessemer Bd. of Educ., 24
Waslo v. North Allegheny School Dist., 26
Wattsburg Area School Dist. v. Jarrett, 26
Wayne-Westland Educ. Ass'n v. Wayne-Westland Community Schools, 52
Weatherspoon v. Department of Labor and Indus., 146
Weblo v. Board of Trustees, 139
Werblood v. Columbia College of Chicago, 211
West Haven School Dist. v. Owens-Corning Fiberglas, 148
West Virginia Inst. of Technology v. West Virginia Human Rights Comm'n, 207
West Virginia State Bd. of Educ. v. Barnette, 75
Westmoreland School Bd., *In re*, 49
Wexner v. Anderson Union High School Dist., 79
Whitaker v. Human Rights Comm'n, 217
White v. University of Idaho, 239
Whitewater Challengers, Inc. v. Weatherly School Dist., 187
Whitling v. Keystone School Dist., 27
Wicks v. Mississippi Valley State Univ., 212
Wieszchowski v. Skidmore College, 238
Wilks v. Taylor School Dist., 7
Williams v. Boston School Comm., 112
Williams v. Carbon County Bd. of Educ., 135
Williams v. Kearbey, 128
Williams v. Lafayette Parish School Bd., 34
Williams v. Orleans Parish School Bd., 131

Willis v. Watson Chapel School Dist., 6
Wilson v. Miladin, 165
Wilson v. State, 237
Wilson v. State Resident Comm., 224
Winston v. Board of Educ. of Chicago, 130
Winston v. Orleans Parish School Bd., 24
Winthurst, *In re*, 229
Wisconsin v. Yoder, 64
Witters v. State Comm'n for the Blind, 227
Wolf, *In re*, 15
Wolman v. Walter, 68, 175
Women's Equity Action League v. Bell, 203
Women's Equity Action League v. Cavazos, 203
Wu v. Thomas, 204

Yates v. J.W. Campbell Elec. Corp., 131
Yates v. State Bd. for Community College Educ., 220
Yeargain v. Daniel Int'l, 240
Yoder v. Ohio State Bd. of Educ., 37
York v. Jones, 241
Young v. St. Louis Univ., 238

Zagano v. Fordham Univ., 213
Zavaletta v. American Bar Ass'n, 245
Zhigulina v. Los Angeles City Bd. of Educ., 35

INDEX

academic dismissal—see dismissal
academic dishonesty, 216, 233
acquired immune deficiency syndrome (AIDS) 77, 97, 106, 117-118, 239, 244
administrative regulation and statutory provisions, 31-33
admissions, 223
advancement of religion—see constitutional rights
affirmative action, 169, 204
age discrimination—see discrimination
Age Discrimination in Employment Act of 1975 (ADEA), 2, 6, 7, 202, 208
agency shop fees, 39, 40
Aid to Families with Dependent Children (AFDC), 226
alcoholic beverage—see drugs
antitrust suit, 245
apartheid, 237
arbitration and arbitrability, 18, 29, 48-50, 54, 57, 211, 222, 240, 241
asbestos, 147-148, 238, 241
assault/battery, 20, 83, 128, 153, 161, 239
assignment (pupil), 60-62
attorneys' fees, 9, 12, 39, 66, 69, 71, 76, 110, 112-114, 122, 143, 177, 200, 204, 210, 213, 237, 241

back pay, 3, 20, 21, 36, 54, 56, 207
bankruptcy, 220, 226-228
bargaining, 38-58—see collective bargaining
bilingual-bicultural programs, 36, 86-87
bonds, 182, 190-191
breach of contract—see contracts (disputes)
bumping—see reduction in force
burden of proof, 3, 52
bus/busing/bus drivers, 7, 11, 12, 30, 34, 37, 47, 54, 62, 129-130, 137, 141, 148

calendar, 45, 51
call-back rights—see reduction in force
campus police—see security
certification/decertification, 27, 35-37
change in placement—see placement
child abuse, 86
Civil Rights Act of 1866 section 1981, 2-4, 169-170
Civil Rights Act of 1871 section 1983, 2-6, 8, 16, 64, 103, 152, 153, 160, 201, 217
Civil Rights Act of 1964 title VI, 86, 87, 90, 202, 203, 223, 232
  title VII, 2, 5, 6, 202, 204-207, 212, 213, 217, 235
civil rights complaint, 129, 143, 153, 212, 232, 235, 236
class action, 147
collective bargaining, 18, 28, 168, 211, 219, 221-223
  agency shop, 39, 40
  agreement, 47
  arbitrability, 18, 29, 48-50, 54, 211, 222
  bargaining unit, 221
  dues deduction, 12, 32, 39, 40, 41
  judicial review, 51-57
  negotiable items—see scope of bargaining (below)
  recognition and representation, 42-44
  rights and obligations of exclusive bargaining representatives, 44
  school calendar, 45, 51
  scope of bargaining, 45-47
  unit determination, 42-43
  use of certified employees, 168
closed forum—see Equal Access Act
comparative negligence—see tort (negligence)
compensation—see wages
compensatory damages—see damages
compliance with board policies and state statutes, 21-24
compulsory attendance, 64, 66-67
conflict of interest, 198
constitutional rights, 8, 69-80, 139, 158, 159, 209, 210, 242
  association, 10, 42, 158
    employment, 10
  privacy, 11, 78, 128, 159, 242
  religion, 73-77
  speech, 8-10, 39, 77-80, 209-210
contracts, 149-152, 240-242
  administrative regulation and statutory provisions, 31-33
  bidding, 150, 151, 242
  disputes, 28-33, 167-168, 232, 233, 234, 240-242
  liability, 208, 216, 241
  supplement, 30
contributory negligence—see tort (negligence)
copyrights, 245
corporal punishment, 84-86, 126, 136, 153

damages, 8, 9, 12, 16, 22, 60, 69, 71, 110, 132, 137, 143, 148, 151, 154, 164, 208, 210, 217, 219, 237
deceptive practices, 242, 245
defamation—see tort (intentional)

Department of Defense overseas schools, 45
Department of Education, 182-183, 224, 229
Department of Labor, Division of Workman's Compensation—see workers' compensation
desegregation/segregation/integration, 87-94, 142
  court supervision, 93-94
  cross district, 87-90
  plan oversight, 90-93
  unitary status, 90-93
diabetes, 37
discipline, 13, 16-24, 80-86, 109-110
discrimination
  age, 6-7, 208
  employment, 2-7, 202-209, 211
  handicap, 7, 117-121, 208, 237
  national origin, 6, 206, 207, 211
  race, 3, 4, 88, 94, 169, 203, 204, 218, 223, 235, 236
  religion, 5, 205
  sex, 5, 6, 9, 170, 204, 205, 206, 207, 218, 227, 236
dismissal, 16-24, 205, 232-236
  academic, 233-236
  disciplinary, 84, 232-233
doctrine of *res judicata*—see *res judicata*
drinking—see drugs (alcohol)
drugs, narcotics, 61, 77, 122, 157, 214,
  alcohol, 83, 122, 157, 238, 240, 243, 244
  cocaine, 72, 83
  marijuana, 9, 69, 82
  testing, 11, 71-72, 159
due process clause—see fourteenth amendment

Education Amendments of 1972 title IX, 2, 202, 207
Education for All Handicapped Children Act of 1975 (P.L. 94-142), 96-109, 143, 159
  administrative remedies, 100-101
  discipline, 109-110
  entitlement to services, 96-98
  procedural safeguards, 98-103
  related services, 108-109
  standing to sue, 102, 115
  statute of limitations, 102
  stay put/status quo, 99-100
elections, 191
Elementary and Secondary Education Act of 1965, 27, 173, 183
eleventh amendment, 114, 115, 201, 218
emotional health, 22
employee discrimination, 2-7, 119-120, 202-209
employee injuries—see workers' compensation
Employee Retirement Security Act of 1974, 220
employees, 1-37, 144-146, 154, 166-167, 202-223
environmental impact, 200
Equal Access Act, 73, 74
equal educational opportunity, 176
Equal Employment Opportunities Act, 86
Equal Employment Opportunity Commission (EEOC), 3, 204, 205, 208, 212, 213
Equal Pay Act (EPA), 2, 202, 207
equal protection clause—see fourteenth amendment
establishment clause—see first amendment
estates, 201, 246
evaluation, 22, 23, 42, 46, 211, 212, 213
excessive entanglement—see first amendment (establishment clause)
expulsion/expel—see suspension (pupil)
extracurricular activity
  basketball, 19, 157, 167, 171
  bicycling, 243
  cheerleading, 124, 165
  coaching, 10, 19, 31, 161, 166, 167, 168, 169, 171, 198
  equality of program, 159-160
  football, 31, 82, 131, 156, 161, 162, 163, 165, 169, 172, 239
  ice hockey, 160
  jogging, 161, 238, 243
  locker room, 165
  playground, 51, 132, 133, 135
  removal from, 82, 84, 156
  rest rooms, 244
  rope ladder, 125
  scuba, 243
  security, 133
  sledding, 127
  soccer, 158
  softball, 167
  swimming, 164
  tennis, 170
  track, 159
  volleyball, 166
  wrestling, 10, 83, 164

fair share fees—see collective bargaining (dues deduction)
federal funds for education, 81, 182-183
Federal Labor Relations Authority, 45
fees, 60, 61, 119, 183-184
fifth amendment, 8
finance, 173-193
financial aid, 224-230
fingerprinting, 11

first amendment, 11, 12, 39, 42, 73-80, 172, 175, 196, 209-216, 217, 221, 230, 234
  establishment clause, 67, 73, 74, 75, 76, 172, 174, 175, 196
    advance nor inhibit, 73, 172, 174
    excessive entanglement, 73, 174
  free exercise clause, 63, 66, 67, 68, 196, 227
  freedom of educational process doctrine, 75
  protected speech/expression, 11-12, 76, 77-80, 209-210, 214, 230
forum—see Equal Access Act
foundation programs—see public school funding
fourteenth amendment, 39, 153, 234, 236
  due process, 52, 65, 83, 153, 156, 158, 159, 212, 214, 217, 224, 233, 236
    substantive, 11-12, 84, 85, 234
    procedural, 12-16, 234
  liberty right, 13-14
  property right, 13-14, 21, 83, 156, 158, 159, 212, 217, 234
  equal protection, 3, 4, 32, 63, 80, 158, 177, 179, 180, 213, 224, 227
fourth amendment, 11, 70, 236
fraternity, 238
fraud, 36, 233, 240, 242
free exercise clause—see first amendment
freedom of association—see constitutional rights
freedom of information—see open meetings/records
freedom of religion—see constitutional rights
freedom of speech—see constitutional rights
fringe benefits—see wages (benefits)

gift students—see individualized education program (IEP)
government immunity—see immunity
grievance, 10, 18, 42, 45, 46, 48, 49, 50, 51, 53, 219

handicap discrimination—see discrimination
Handicapped Children's Protection Act (HCPA), 96, 103, 110, 112-114
harassment, 214
Hatch Act, 196
hearing, 15-16, 82, 98
higher education, 194-246
Hill-Burton Act, 202
hold harmless agreement, 192
home instruction, 63-66
hospitals/medical schools, 201, 202, 223, 235, 236, 239, 244

immorality, 20-21, 37
immunity, 8, 114, 115, 132-133, 152, 154, 164, 165, 201, 218, 241, 243, 244
  governmental, 133-136
  statutory, 136-138
incompetence, 17, 21
individualized education program (IEP), 96, 99, 102, 107, 111, 116, 157
inhibiting religion—see first amendment
inoculation, 66
insubordination, 17, 18-19
insurance, 102, 115, 141-143, 239
  intentional tort—see tort
intergovernmental relations, 195-202

laches, 3
lease purchase agreement, 196, 200
least restrictive environment, 104-107
leaves,
  maternity, 32-33
  sick, 21, 23, 30, 49, 52, 187
liability, 237-246
  insurance, 141-143, 239
  product, 147-149, 238
libel—see tort (intentional)
liberty right—see fourteenth amendment
licensure—see certification
limited forum—see Equal Access Act

magnet schools, 92, 94
mainstreaming, 105-107
malpractice—see tort
mandatory topics of bargaining—see collective bargaining (scope)
medical schools—see hospitals
minor labor laws, 164
moral turpitude-see immorality

National Labor Relations Board, 43
negligence—see tort
nonrenewal—see tenure
nontenured—see tenure
National Collegiate Athletic Association (NCAA), 159
notice, 15, 22

open forum—see Equal Access Act
open meetings/records laws, 11, 171, 198, 199, 233, 242
Overseas Education Association—see Department of Defense Dependence Schools

patents/trademarks, 171, 245
payroll deduction—see collective bargaining (dues deduction)
Pell Grant Program, 226
permissive topics of bargaining—see collective bargaining (scope)

personal and personnel records, 11
physical education classes, 9, 125-126, 131
placement, 103-108
  change, 99-100
  lease restrictive environment (LRE), 104-107
  mainstreaming, 105-107
  private facilities, 107-108
plagiarism, 216, 233
pregnancy, 33
privacy—see search and seizure
private and parochial schools, 67-69, 74
prohibited topics of bargaining—see collective bargaining (scope)
property rights—see fourteenth amendment
psychiatric disability, 7
public forum—see Equal Access Act
public funds
  for private schools, 174-175
Public Law 94-142—see Education for All Handicapped Children Act of 1975
public records—see open meetings/records
public school funding, 175-184
  ad valorem taxes, 186, 188, 189, 192
  allocation, 174-184
  desegregation costs, 181
  federal funds, 182-183
  local funds, 181-182
  penalties, forfeitures, and fines, 192
  referenda, 188
  revenue disbursement, 190
  sources, 174-184
  state finance programs, 175-181
pupils, 59-94

quiet title action, 201

race discrimination—see discrimination
rape—see sexual assault
rational relationship/basis—see fourteenth amendment (equal protection)
realignment and reassignment, 27, 28, 89
reasonable suspicion—see search and seizure
recovery of funds
  misused federal funds, 182-183, 226
  student financial assistance, 225
reduction-in-force (RIF), 24-28, 52-55, 56
  criteria, 25, 26, 48
  elimination of position, 25
  recall, 28
Rehabilitation Act of 1973, 97, 202, 208
  section 504, 2, 61, 117-122, 237
religious discrimination—see discrimination
res judicata, 17
respondeat superior, 4, 163
retaliation, 4, 10, 154, 206, 239
right of association—see constitutional rights

salary—see wages
sanctions—see strikes
school lands, 130, 131
search and seizure, 69-72
  reasonable suspicion, 70
section 504—see Rehabilitation Act of 1973
section 1981—see Civil Rights Act of 1866
section 1983—see Civil Rights Act of 1871
security, 133, 199
segregation-see desegregation
seniority, 25, 26, 54, 55, 220
sex discrimination—see discrimination
sexual abuse/assault/molestation/rape, 20, 33, 37, 125, 127, 133, 134, 141, 143, 146, 152, 168, 199, 239, 244
sexual activity/advance/harassment, 5, 8, 20, 140, 207, 219, 236
sexual relations/misconduct,
sick leave—see leaves
slander—see tort (libel)
snow days, 29
speech—see constitutional rights
sports—see extracurricular
  eligibility, 156-159
    age, 157
    discipline, 156
    drug testing, 159
    limitation, 157
    outside participation, 158-159
    transfer, 158
  employment, 166-167
  enforcement of rules, 160
  equality of programs, 159, 160
  tort, 160, 165
state finance programs—see public school funding
state labor relations board, 46, 56, 58
statute of limitations, 139, 140, 148, 201, 204, 216, 223, 229, 235, 237, 240, 241
stay put/status quo—see Education for All Handicapped Children Act of 1975
strict liability-see tort
strict scrutiny, 80
strikes and sanctions, 57-58, 80-86
student financial aid, 224-230
student injuries, 123-132
substantive constitutional rights—see constitutional rights
sunshine laws, 198, 199
supervision, 46, 126, 128, 136, 243
supplemental contracts—see contracts

- supplemental duties, 29, 30, 45, 51
- suspension (pupil), 81-84

- tax (property), 170-171, 200
  - assessment and collection, 185-187
  - deductions, 190
  - delinquent taxes, 192-193
  - elections, 186
  - errors, 180, 182
  - exempt status, 188-190
  - reappraisal, 189-192
  - refunds, 182, 187, 189, 190
  - revenue disbursement, 190
- teaching schedule, 29, 45, 56
- tenure, 33-35, 47, 206, 214-216
  - *de facto*, 211
  - default or acquiescence, 35
  - demotion, 17
  - denial, 48, 210-214
  - nonrenewal, 16-24, 52-55, 166, 210-214
  - nontenured, 209-214
  - status, 33-35
  - termination, 17, 166, 198, 214-216
  - transfer, 23
- title I—see Elementary and Secondary Education Act of 1965
- title VI—see Civil Rights Act of 1964
- title VII—see Civil Rights Act of 1964
- title IX—see Education Amendments Act of 1972
- topics of bargaining—see collective bargaining (scope)
- tort, 123-154, 160-165, 237-239
  - constitutional, 152-154
  - contracts, 18, 147, 149-152, 167
  - defenses, 132-141, 243
  - intentional, 128, 147, 160-161, 239
  - defamation, 146, 167, 219, 231
  - libel and slander, 10, 231
  - malpractice, 118, 244, 245
  - negligence, 124-132, 150, 161-165, 233, 238, 243-244
  - strict liability, 127
- transportation, 11, 62-63, 69, 108-109
- Tucker Act, 224
- tuition, 60-62, 80, 101, 111-112, 184, 223-224

- unemployment compensation, 18, 21-22, 31, 36, 169, 220, 221, 239
- unfair labor practice, 45, 49, 50, 58, 221, 222
- unfitness, 19-20
- union fees, 214, 221
- unprofessional conduct, 19-20
- urinalysis, 11, 71-72
- use of school facilities—see Equal Access Act

- wages, 47, 48, 51
  - benefits, 32, 219-221, 239
  - faculty privileges, 216
  - overtime pay, 48
  - sabbaticals, 222
  - tuition assistance, 220
- whistle blowing, 210
- willful neglect of duty, 19-20
- wills, 246
- workers' compensation, 32, 128, 144-146, 239, 240
- Workman's Compensation—see workers' compensation
- wrongful death, 243

- zoning, 199, 200